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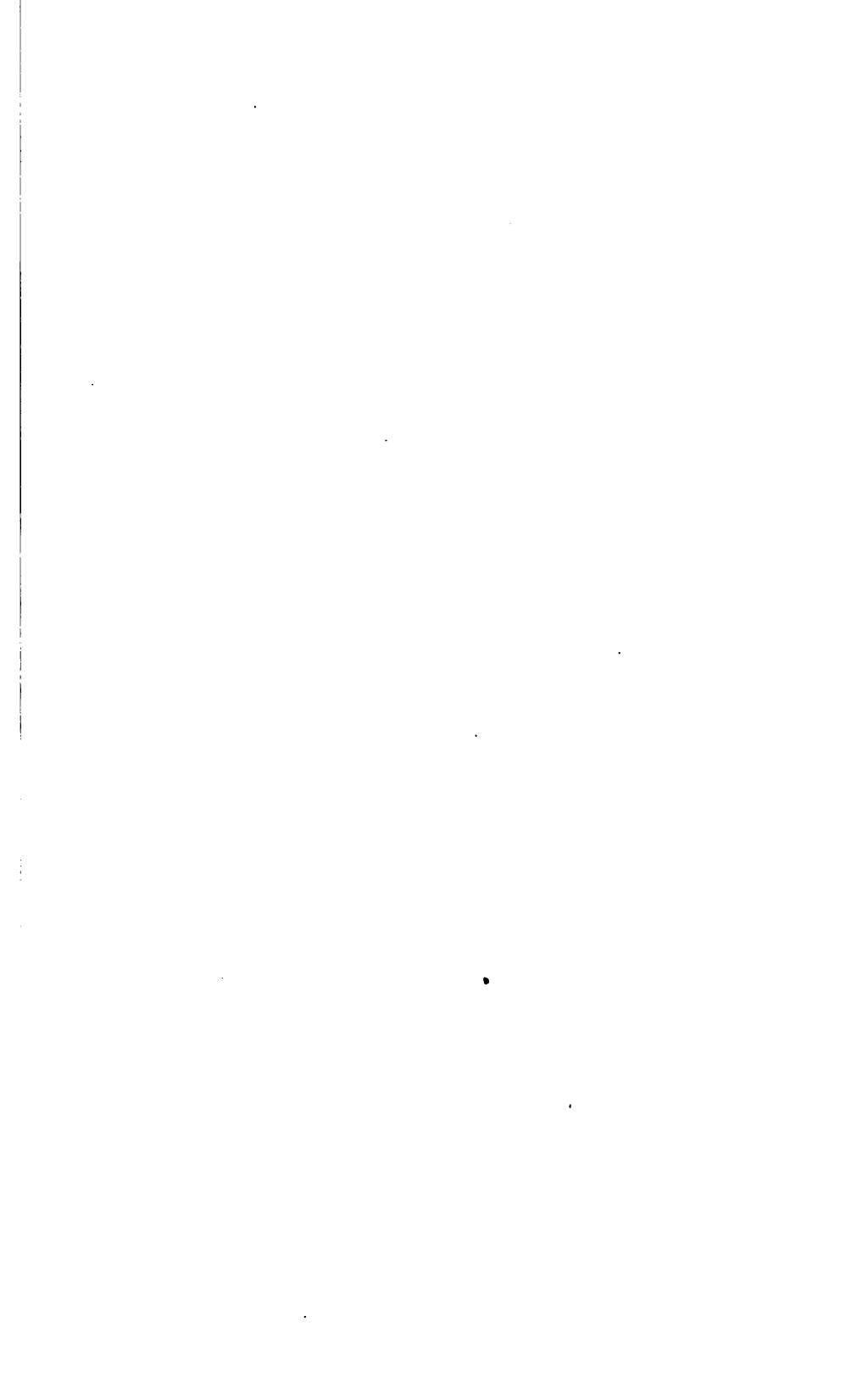
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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER

REPORTER

VOLUME 95

FROM JANUARY 20, 1920, TO APRIL 6, 1920

**SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1920**

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April 6, 1920.

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IN THE

STATE OF OREGON

April 6, 1920.

County.	Name.	Official Address.
Baker.....	Levens, W. S.	Baker
Benton.....	Clarke, Arthur	Corvallis
Clackamas.....	Hedges, Gilbert L.....	Oregon City
Clatsop.....	Barratt, Jasper J.....	Astoria
Columbia.....	Metsker, Glen R.....	St. Helens
Coos.....	Hall, John F.....	Marshfield
Crook.....	Wirtz, Willard H.....	Prineville
Curry.....	Buffington, Collier H.....	Gold Beach
Deschutes.....	Moore, Arthur J.....	Bend
Douglas.....	Neuner, George, Jr.....	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
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Harney.....	Sixmore, George S.	Burns
Hood River.....	Derby, A. J.....	Hood River
Jackson.....	Roberts, G. M.	Medford
Jefferson.....	Boylan, Bert C.	Metolius
Josephine.....	Miller, W. T.....	Grants Pass
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Lincoln.....	Geo. B. McCluskey.....	Toledo
Linn.....	Hill, Gale S.....	Albany
Malheur.....	Swagler, B. W.....	Malheur
Marion.....	Gehlhar, Max	Salem
Morrow.....	Notson, Samuel E.....	Heppner
Multnomah.....	Evans, Walter H.....	Portland
Polk.....	Piasecki, E. K.	Dallas
Sherman.....	Huddleston, C. M.....	Wasco
Tillamook.....	Goyne, T. H.	Tillamook
Umatilla.....	Keator, B. I.	Pendleton
Union.....	Hodgin, John S.	La Grande
Wallowa.....	Fairchild, Abijah	Enterprise
Wasco.....	Galloway, Francis V.	The Dalles
Washington.....	Tongue, E. B.....	Hillsboro
Wheeler.....	Trill, Wallace G.....	Fossil
Yamhill.....	Conner, Roswell L.	McMinnville

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Motion to dismiss appeal submitted December 13, overruled December 31, 1918, argued on the merits November 25, 1919, affirmed January 20, 1920.

ROHRBACHER v. STRAIN.*

(176 Pac. 990; 186 Pac. 583.)

Appeal and Error—Notice—Description of Judgment.

1. An appeal could not be sustained, notice being of appeal from decree of June 17th, the undertaking on appeal being indefinite as to date of decree, and there being nothing in the transcript to identify the decree mentioned in the notice with that shown in the transcript as rendered June 26th.

Appeal and Error—Ineffectual Attempt—Second Appeal.

2. An attempt to take an appeal, ineffectual because of misdescription of decree in notice of appeal, does not preclude taking of second appeal.

ON THE MERITS.

Appeal and Error—Findings of Trial Court of Strong Advisory Weight in Equity.

3. Since trial court has heard the witnesses orally, and has had a chance to observe their manner and appearance, and a much better opportunity to judge of their truthfulness than appellate court, findings and decisions of trial court have a very strong advisory weight with appellate court.

Escrows—Evidence Sufficient to Sustain Finding That Deed was not Wrongfully Delivered.

4. In action to cancel deed, evidence held sufficient to show that third party, with whom plaintiff left blank deed in escrow, had delivered deed to defendant, an innocent purchaser, in violation of instructions.

From Multnomah: JOHN P. KAVANAUGH, Judge.

*On necessity of strict compliance with condition in escrow agreement, see note in L. R. A. 1916A, 502.

In Banc.

This is a motion to dismiss an appeal. The transcript filed by appellant shows that on June 26, 1918, a decree was made and entered against plaintiff and in favor of defendant; that thereafter on August 25, 1918, plaintiff served and filed his notice of appeal, and seasonably filed his transcript in this court. Respondent files in this court a supplemental transcript, which shows that on July 11, 1918, plaintiff attempted to take a prior appeal by serving and filing the following notice, which stated the title of the cause and was directed to the defendant and his attorneys and read as follows:

"Notice is hereby given that the plaintiff, Joseph Rohrbacher, appeals to the Supreme Court of the State of Oregon from the judgment and decree made and entered in the above-entitled court and cause on the 17th of June, 1918, and the whole thereof.

"HOLGATE, MURDOCH & HALL,
"Attorneys for Plaintiff."

On the nineteenth day of July, 1918, plaintiff filed the usual undertaking on appeal, which was not objected to, and if the notice above quoted was sufficient the appeal became perfected. Plaintiff failed to file a transcript here in pursuance to this notice, but abandoned all proceedings thereunder on the theory that the misdescription of the decree, by assigning to it the date of the 17th of June instead of the true date, June 26th, rendered the attempted appeal void. The motion to dismiss is based upon the assumption that the misdescription was immaterial and that plaintiff having taken and perfected a valid appeal, could not thereafter abandon it and take a new appeal. It is conceded that if the first appeal could have been sustained here that defendant's contention is well founded, and

the second appeal can only be upheld on the theory that the first was void.

OVERRULED.

Messrs. Flegel, Reynolds & Flegel, for the motion.

Messrs. Holgate, Murdock & Hall, contra.

McBRIDE, C. J.—1. On the theory that courts should be very liberal in construing appeal statutes so, if possible, everyone conceiving himself aggrieved should have the privilege of a hearing upon the merits in this court, we have sustained appeals in every case where by an inspection of the record this court was enabled to identify the judgment appealed from. In all these cases, however, there was no misdescription of the judgment in any particular, but merely a lack of data which the court was enabled to supply by an inspection of the transcript itself. Thus in *Keady v. United Rys. Co.*, 57 Or. 325 (100 Pac. 658, 108 Pac. 197), it was held that the undertaking on appeal might be examined to identify the judgment appealed from, citing also *Moorhouse v. Donica*, 13 Or. 435 (11 Pac. 71); *Salem Traction Co. v. Anson*, 41 Or. 562 (67 Pac. 1015, 69 Pac. 675).

This test cannot be successfully applied here because the undertaking on the first attempted appeal is indefinite as to the date, and there is nothing in the transcript to identify the decree mentioned in the notice with that rendered on June 26th. Affidavits are filed to the effect that there was only one decree in any controversy between the parties, but the decisions have never gone to the extent of holding that such affidavits *dehors* the transcript can be resorted to, to identify the judgment appealed from. Had the appellant stood

upon his first attempted appeal it would have been dismissed here for want of jurisdiction.

2. Not having perfected a valid appeal in pursuance of the first notice, appellant was not precluded from taking a second appeal: *Watts v. State Spiritualists' Assn.*, 56 Or. 56 (107 Pac. 695).

The motion to dismiss is overruled. **OVERRULED.**

Affirmed January 20, 1920.

ON THE MERITS.

(186 Pac. 583.)

Department 2.

This is a suit in equity to set aside a deed from the plaintiff and appellant to the defendant and respondent. It seems from the evidence, that the deed in question was executed by the plaintiff in blank and left with one W. L. Cooper, an attorney in Portland, Oregon, to be delivered under certain conditions. What these conditions were, and whether or not the deed was filled out and delivered in accordance with such conditions, is the main controversy in the case. The negotiations which led up to the final transaction are confused and complicated, but, as disclosed by the evidence, they seem to have been about as follows:

The plaintiff and a man named Brown had been engaged in several real estate speculations together. Brown either held or had in his control the title to a certain 60-acre tract of land in the State of Washington, which was heavily mortgaged. It was arranged between them that plaintiff should obtain a loan for Brown in the sum of \$500. As security for this loan, the tract of land was deeded to the plaintiff, with the

understanding that if he had to pay the note the land was to be turned over to him, but if he did not have to pay the note, Brown was to give him a one hundred dollar bonus for the loan. While the title was thus standing in the name of the plaintiff, he and Brown traded this 60-acre tract of land, subject to the mortgage thereon, for certain houses and lots in Irvington, also subject to a mortgage. The deed to this property was also taken in the name of the plaintiff, but it seems to have been recognized by all the parties that Brown had some interest or equity therein.

There seems to have been some talk and negotiation between plaintiff and Brown, in an attempted arrangement to trade this Irvington property for other property, and the deed in question was signed by the plaintiff and left with Cooper to be filled out and turned over to a purchaser when a trade should be arranged. So far the parties are practically agreed but as to the nature of the trade which was authorized, and as to the directions which Cooper had, as to the filling out and delivery of the deed, the plaintiff and Brown and Cooper differ widely. Plaintiff claims that he left the deed with Cooper under a definite understanding that the property was to be traded for a certain place, known as the "Kangus" place in the State of Washington, and that he only authorized Cooper to fill it out and deliver it, in return for title to that particular place. On the other hand, Brown and Cooper testify that it was to be exchanged directly or through certain trades, if necessary, for a designated apartment house in the City of Portland, subject to mortgages thereon.

Up to this time Strain, the defendant, had nothing to do with the transaction, but he was the owner of a farm in the State of Washington, valued at about \$7,000, and subject to a mortgage of about \$2,000.

Brown then proceeded to negotiate apparently a three-cornered deal, which included the property of the defendant, and by which the plaintiff was to get the apartment house, subject to the mortgage; the defendant was to have the Irvington property, subject to the mortgage on that, and was to deed the property owned by him in the State of Washington to a person designated by Brown, in apparent payment for the apartment house, though just how that part of the deal was arranged is not clear from the evidence. It seems certain that the plaintiff, if he assented to the apartment house deal at all, was intending to trade the apartment house to Kangus for the Kangus place, and a Mr. Lingren, who seems to have had the Kangus place in charge for trading purposes, was negotiating with the plaintiff for such a deal, by which that place should be exchanged for the apartment house. The trade however, fell through, and finally the mortgage on the apartment house was foreclosed and it was sold for the mortgage. Plaintiff then repudiated the deal and brings this suit against the defendant Strain to cancel the deed.

AFFIRMED.

For appellant there was a brief over the names of *Mr. P. H. Murdock*, *Mr. D. W. Holgate* and *Mr. H. E. Hall*, with an oral argument by *Mr. Murdock*.

For respondent there was a brief over the names of *Messrs. Flegel, Reynolds & Flegel*, with an oral argument by *Mr. John W. Reynolds*.

BENNETT, J.—The testimony of Cooper and Brown on the one side, and the plaintiff on the other, is in irreconcilable conflict as to what were the conditions of the escrow. Cooper testified that the deeds

were duly executed and acknowledged in his office and before him as a notary public, and were left there with the understanding that they were to be exchanged for the apartment house or, if that could not be obtained, then for certain land in Lincoln County, and that he held them there until the apartment house deed was brought and deposited, and then delivered them to either the plaintiff or to Brown, who were both at that time together and who took them out of the office. He further testified:

“Q. In allowing this deed to be delivered to Mr. Brown, were you contradicting any instructions or conditions of which you were aware?

“A. Why, no; of course not, or I would not have delivered it. And another thing too that Mr. Rohrbacher said, that I was to examine the property known as the ‘Kangus’ property—the title—I never heard tell of such a thing. The only property I was to find out about the title to, was this in Lincoln County. I never heard tell of any examination of any property in Washington for me to examine the title to. I never tried to and had no instructions to that effect.”

And again on cross-examination:

“Q. When the deeds were signed and left with you, what instructions, if any, did you have regarding the deed?

“A. To see that the title to the west half of Sec. 16, T. 13 S. R. 8 W. was in the name of Hans Bergstrom with nothing against it but the \$800 and some back taxes. They had a list of that already prepared.

“Q. There was nothing said to you whatever in regard to holding those deeds until you had received a deed running to Rohrbacher for what is known as the Kangus place?

“A. Never heard at all of that at that time or until after these deeds were delivered.”

And again:

"Q. Isn't it a fact Brown and Rohrbacher came into your office that day and Mr. Brown explained to you the whole transaction, that they expected Rohrbacher's houses would go to the party that held that wild land and the one that Rohrbacher's property was to go to was the party probably who owned the apartment house, and the wild land, and Kangus was to get the apartment house for his farm, which was to be deeded to Rohrbacher?

"A. I never heard of the Kangus name until after that. The understanding was with Mr. Rohrbacher, Mr. Brown and myself that Mr. Rohrbacher was to get the apartment house, but he might fail to get the apartment house, and for fear that he would, he would take the land in Lincoln County, and he wanted to see that the title was all right to the land in Lincoln County."

Brown testified in relation to the matter, as follows:

"A. Well, we were to put in those houses, this house that Mr. Rohrbacher was interested in with me, and then a piece of property that he had over on Carruthers Street, and I was to make the exchange whereby I would get some raw land, and then after that I told him I could trade for the apartment house with Mr. Hatfield. And so I told him we wanted to investigate these transactions one by one, because there might any one of them fall down, and so the deal was made on the land. He further agreed to take the land if it had not went any further.

"Q. You refer to the Lincoln County property and the first Washington property in the transaction?

"A. Yes, sir.

"Q. Go ahead.

"A. But then I got the apartment house for him, so the deal was consummated as far as we were concerned.

"Q. (By the Court.) Begin at the beginning and detail that transaction.

"A. On the land?

"Q. (By the Court.) On the whole business; what was the first transaction that entered into this?

"A. Well, I traded one of the houses off for some land in Lincoln County.

"Q. (By the Court.) No, I mean before you got hold of this property out here at all?

"A. Mr. Rohrbacher and I?

"Q. (By the Court.) Yes, your first business deal?

"A. Well, I had 60 acres of land over here near Sifton with a \$2,200 mortgage on it. There was about \$2,200 encumbrance. I think the mortgage was \$2,000, and I offered to sell Rohrbacher a half interest in that land for \$500, and he went over and looked at it and came back and then he said that if I would take the \$500 and pay off on the encumbrance he would be satisfied if he got a hundred dollars out of the deal, and he would hold it as security. And I give him the deed to that and also signed a note to the bank with him for the \$500.

"Q. (By the Court.) What was the next step?

"A. Well, then I traded that off for this Irvington Heights property and had it in his name.

"Q. (By the Court.) What was the equity worth in the Washington property?

"A. Well, it had sold for about \$6,000; 60 acres worth about \$5,000, I guess.

"Q. (By the Court.) You mean the equity?

"A. The equity was probably \$2,500 or \$3,000.

"Q. (By the Court.) And then you got this property, the Irvington Heights for that?

"A. Yes, sir.

"Q. (By the Court.) How long did you hold that?

"A. A little over a month.

"Q. (By the Court.) What was the next step?

"A. Well, then I had a chance to get this land that I traded for the apartment house.

"Q. (By the Court.) Now, just detail the circumstances. That was in Mr. Rohrbacher's name and you say he had a claim of \$500 against it?

"A. Well, he had \$500 in the property.

"Q. (By the Court.) What was it worth?

"A. The Irvington Heights?

"Q. Yes.

"A. Well, I don't know what it is worth. There was \$2,500 or \$2,300 encumbrance against it. I guess probably it was worth about \$5,000.

"Q. (By the Court.) In addition to the encumbrance?

"A. No.

"Q. (By the Court.) You figured that you would have an equity then of how much over Mr. Rohrbacher's \$500?

"A. Well, I would have a couple of thousand dollars.

"Q. (By the Court.) Then what did you do?

"A. Well, after that, after we made that transfer, then I had a chance to turn this property in for some land and I told him—

"Q. Where?

"A. Well, some of it was over at Washougal and the other was down in Lincoln County. And so he agreed to make that transfer, but I mentioned at that time that I could trade this land for an apartment house.

"Q. (By the Court.) The land you were to get the Irvington Heights property?

"A. Yes, sir.

"Q. (By the Court.) Well, what next?

"A. Well, I made the deal for the apartment house.

"Q. (By the Court.) Did you go out and see that?

"A. Yes, sir, we went out and looked at it, inspected it, looked at the income, how much it brought in, looked at it thoroughly, looked into it thoroughly. Mr. Lingren took him out there.

"Q. (By the Court.) And then what happened?

"A. Well, then, that is as far as I went with it, because then it was Mr. Lingren and Mr. Rohrbacher. They were on another deal.

"Q. (By the Court.) Did you get the apartment house?

"A. Yes, sir.

"Q. (By the Court.) You made the deal?

"A. Yes, sir.

"Q. (By the Court.) In whose name was it taken?

"A. Mr. Rohrbachers. * *

"Q. Was anything said to your memory to Mr. Cooper in putting those deeds up, with reference to the Kangus place being the objective of this transaction?

"A. There was nothing said about it being the objective. Mr. Lingren told him if he made the trade and got the apartment house, he said he thought he could get him the Kangus farm. I had nothing to do with the Kangus farm."

In these matters they were corroborated to some extent by Lingren. On the other hand, plaintiff testified that the deeds were blank, except as to signature, when he left them with Cooper, and neither the description, the consideration or the name of the grantee was filled in, and that they were not acknowledged; and that the condition of the escrow was, that "he should hold the deed—and not transfer them or give them to anybody—until they got a deed for me to the Kangus place."

Mrs. Wilson, a witness called for plaintiff, testified:

"A. I heard Mr. Brown say to Mr. Rohrbacher he had come out to tell him of what he called a three-cornered deal; he had a trade for Mr. Rohrbacher's house in Portland for a piece of land, raw land, they called it.

"Q. (By the Court.) Do you know where?

"A. I could not say where, but this wild land, my understanding was to go for an apartment house, and the apartment house was to be traded or was traded—the deal was supposed to have been made, for the Kangus place at Hawkinson. Furthermore, I did not hear much because I did not stop to listen.

"Q. Was there any conversation down there looking toward or with the purport of Mr. Rohrbacher becoming the owner of either the wild land or the apartment house?

"A. Oh, I heard Mr. Rohrbacher simply say that he did not want the wild land or the apartment house, and

I heard Mr. Brown say to him that he could get the Kangus place for his property.”

And Mr. Wilson testified substantially to the same facts.

3, 4. In this state of the evidence it is impossible to say with absolute certainty what was the real transaction between the parties. It is practically admitted by all parties that Mr. Strain, the defendant, was an innocent purchaser in good faith and supposed he was getting a good title and that he transferred his valuable farm to third parties in consideration of the deal. The court below heard the witnesses orally and had a chance to observe their manner and appearance, and a much better opportunity to judge of their truthfulness respectively, than we can possibly have. Under these circumstances its findings and decisions have very strong advisory weight, and where the testimony is so uncertain and conflicting and depends so entirely upon the credibility of the different witnesses, we do not feel justified in disturbing these findings.

The decree of the court below is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BURNETT, JJ., concur.

Argued November 20, reversed and decree rendered December 30, 1919, rehearing denied January 27, 1920.

PALMITER v. HACKETT.

(185 Pac. 1105; 186 Pac. 581.)

Fraud—Mere Silence not Fraud Where No Duty to Speak.

1. Individuals dealing at arm's-length must look out for themselves, and mere silence is not fraud where no duty is imposed upon one to speak, but a half truth spoken with the design of influencing the opposite party, where he has not equal means of knowledge, is in itself fraudulent.

Evidence—No Presumption of Knowledge of Ordinances.

2. The proposition that every man is presumed to know the law applies only to the general laws of the land, and not to city ordinances, except in proceedings in municipal courts, in view of Section 90, L. O. L.

Exchange of Property—Fraudulent Concealment.

3. Where one exchanging a building for other real property has actual knowledge of a city ordinance prohibiting the use of a building simultaneously as a garage and as a residence, he is guilty of fraud where he states that the first floor was rented as a garage for \$25 a month, and the second floor for \$25 as living or house-keeping rooms, and that the property could be continued for the uses named; the other person not knowing of the ordinance.

Cancellation of Instruments—Offer to Do Equity not Necessary Where Court may Protect Defendant.

4. The maxim that he who seeks equity must do equity is not violated by failure of the plaintiff, in a suit to rescind an exchange of lands, on the ground of fraud, to allege restoration of and offer to return the consideration, for by his application he tacitly invites the court to protect the defendant by decreeing a restoration in consideration of a rescission.

PETITION FOR REHEARING.**Contracts—Representation Made Recklessly Without Knowledge of Truth Fraudulent.**

5. One of the elements respecting a fraudulent statement warranting a rescission of a contract is that the one making it must either know that it is false, or make it recklessly without any knowledge of its truth and as a positive assertion.

Fraud—One Making Reckless Statement of Fact must Disclose Subsequent Knowledge of Falsity.

6. If a party is so reckless as to make a statement which in fact is untrue and while negotiations are in progress he discovers it is not true, it is his duty to state the whole truth to the other party.

From Hood River: FRED W. WILSON, Judge.

Department 1.

The substance of the complaint is that the plaintiffs were the owners of some acreage in Hood River County and the defendants Nelson Hackett and W. A. Hackett were the owners of a certain lot in Portland. The property of the plaintiffs was encumbered by a mortgage of \$1,600, that of the defendants by two mortgages aggregating \$3,100. Negotiations were opened

for an exchange of properties and, as the plaintiffs allege, for the purpose of inducing them to make the exchange the defendants represented:

“That said lot was improved with a two-story frame building with a good, rentable garage on the first or ground floor thereof, and housekeeping or living-rooms on the second story thereof; that the same was then and had been for a long time leased and rented to tenants for the monthly rental of \$50 a month; that the lower or ground story of said building was suitable and rentable for use and occupation as a garage; that the upper story thereof was suitable and rentable as living or housekeeping rooms; and that the property could be continued for the uses named.”

Other averments upon which the plaintiffs rely state representations said to have been made by the defendants respecting the value of their property. The plaintiffs claim to have relied upon the statements of the defendants, and aver that they were fraudulent and made with the intent to wrong and defraud the plaintiffs, and to procure their property by means of the fraud. The complaint further says in substance that the Portland property belonging to the defendants was not at said time usable and rentable for living or housekeeping rooms on the second story thereof, and was not at said time leased and rented for the rental of \$50 or for any other sum in excess of \$25, but, on the contrary, it was well known to defendants that by the terms of Portland City Ordinance No. 34,764, approved November 27, 1917, entitled “An ordinance amending Section 683 of Ordinance No. 33,911, the Building Code covering garages and declaring an emergency,” and by the terms of Section 682 of Portland City Ordinance No. 33,911, entitled “An ordinance providing building regulations to be known as the Building Code,” approved March 13, 1918, it was

provided that no tenants might occupy the second story of a frame building constructed similarly to the one on said lot, with a large garage underneath; and also well knew that, acting under the terms of said ordinance and its police powers, the proper city authorities had notified said tenants that occupancy of said second story by tenants would not longer be permitted by said city authorities. Further allegations show what is meant by a "large garage" within the purview of the city laws. The plaintiffs say they did not discover the falsity of the utterances of the defendants until after the exchange had been made, when the former demanded a reconveyance of the property in Hood River County and offered to place the defendants in the same position they were before, by returning all that the plaintiffs had received in the exchange.

The answer challenges all the imputed fraud and recites the exchange of properties as viewed from the standpoint of the defendants. The reply traverses much of the new matter in the answer.

The trial court passed a decree for the defendants, dismissing the suit and declaring the defendants Nelson Hackett and his wife the owners of the Hood River property. The plaintiffs appeal.

REVERSED. DECREE RENDERED.

For appellants there was a brief over the name of *Messrs. Bronaugh & Carter*, with an oral argument by *Mr. Jerry E. Bronaugh*.

For respondents there was a brief and an oral argument by *Mr. Ernest C. Smith*.

BURNETT, J.—The vital contention in the suit is whether the representation of the defendants about the

rentability of the property was fraudulent. The testimony is to the effect that the negotiations about the trade began early in December, 1918, and continued until January 27, 1919, when a contract was entered into outlining the terms of the exchange, followed by an exchange of deeds February 6, 1919. When the transaction was first broached, the defendants told the plaintiff Palmiter that the property was rented, the upper story as an apartment wherein a family was residing, and the ground floor as a garage, each at \$25 per month, totaling \$50 per month. The building was of wooden frame construction, sided with rustic and only partly ceiled. During the pendency of the negotiations the plaintiff husband examined the property and saw its physical condition. Meanwhile, the city authorities had waited upon the agent of the defendants in charge of the property and informed him of the ordinance which forbade the use of such a building simultaneously as a garage and as a residence. The agent immediately communicated this to the defendants and under instructions from his principal notified the tenants of the upper story to vacate. In all subsequent negotiations, however, although this warning from the city officials was known to both Nelson and W. A. Hackett, they scrupulously avoided saying anything to the plaintiffs about the matter. The latter were ignorant of the ordinance and of the notification which the city officials gave to the agent of the defendants and which was by him communicated to the defendants. The evidence is plain that the building was not rentable simultaneously as a garage and as a dwelling place; that this was known to the defendants and not to the plaintiffs; and that the representation about the availability of the property for leasing

was made to induce the exchange on the part of the plaintiffs.

In *Boelk v. Nolan*, 56 Or. 229 (107 Pac. 689), the plaintiff had left his realty in Tillamook County in charge of a friend and had gone to California for the benefit of his health. He had not been heard of for several years and in his interest the friend, fearing he was dead, allowed the property to go to sale for taxes and bought it in for the purpose of holding it in trust for the plaintiff. The defendant managed to ascertain where the plaintiff was, went to California and bought the property for a trifling sum, representing to him that his land had been sold for taxes; that his title was gone; and that he, the defendant, wanted the deed from the plaintiff to confirm a title which he himself had acquired. Although well known to him, the defendant said nothing about the attitude and purpose of the friend whom the plaintiff left in custody of the property. The court there held:

"It was the duty of the defendant, when he undertook to inform plaintiff about the condition of the latter's title to the land, to make a full, truthful and complete declaration of all the conditions, within his knowledge, affecting it; and his failure so to do amounts to such a fraud as entitled plaintiff to a cancellation of his deed."

1. The substance of the holding is that when a defendant opens his mouth to make declarations respecting the property involved, he must speak the whole truth, and that a suppression of part of the fact is fraud when made to induce a purchase. This does not infringe upon the rule that individuals dealing at arm's-length must look out for themselves and that mere silence is not fraud where no duty is imposed upon one to speak. A half truth, however, spoken with

a design of influencing the opposite party where he has not equal means of knowledge, is in itself fraudulent. See, also, *Weikel v. Stearns*, 142 Ky. 513 (134 S. W. 908, 34 L. R. A. (N. S.) 1035).

2, 3. It is contended by the defendants that the plaintiffs were bound equally with them to know the city ordinances. It is an old saying that, "Every man is presumed to know the law." But this applies to the general laws of the land. It is said in 28 Cyc. 393:

"The general rule is well settled that municipal ordinances and by-laws are not laws of which judicial notice will be taken, but facts to be pleaded and proven. If not duly pleaded, they cannot be proven; and if duly pleaded and not proven in legal method, the action must fail no matter how notorious the ordinance may have been. The general rule, however, is held not to apply to proceedings brought in a municipal court, for here the ordinance is the peculiar law of the forum, of which the court is bound to take judicial notice, and this obviates any necessity for pleading the ordinance."

The litigation in hand has no relation to any proceeding in a municipal court and must be determined by the general law of the land. Our statute, Section 90, L. O. L., requires city ordinances to be pleaded as facts, which shows that the courts will treat them as facts. Moreover, the plaintiffs did not have equal opportunity with the defendants to know about the ordinances, because the attention of the latter had been especially called to the matter, through their agent, by the city authorities. The defendants were in possession of knowledge affecting the rentability of the property, which was not possessed by the plaintiffs, and it was manifestly concealed with the purpose of inducing the trade. The action of the defendants in keeping

that knowledge from the plaintiffs constitutes a fraud in law sufficient to vitiate the transaction.

4. In *Owen v. Jones*, 68 Or. 311 (136 Pac. 332), the opinion quotes with approval from a decision rendered by Mr. Chief Justice MOORE in *Crossen v. Murphy*, 31 Or. 114 (49 Pac. 858), as follows:

“The maxim that ‘he who seeks equity must do equity’ is evidently not violated by the failure of the plaintiff, in a suit to rescind a contract for fraud, to allege a restoration of, or an offer to return, the consideration, or a willingness even to do so, for by his application to the court for equitable redress he concedes that before it will be awarded he must do equity, which will compel him to account for everything of value he may have received, thereby tacitly inviting the court to protect the rights of the defendant by decreeing a restoration in consideration of the rescission.”

The principles thus enunciated control the determination of the issue here. The decree of the Circuit Court will therefore be reversed and one here rendered to the effect that the defendants reconvey to the plaintiffs the Hood River County property and that the plaintiffs reconvey to the defendants Nelson Hackett and W. A. Hackett the Portland property, and return to said defendants the promissory note for \$400 taken as part of the exchange, together with \$600 cash paid thereon; each conveyance to be delivered to the clerk of the Circuit Court for the opposite party within ten days from the entry there of the mandate of this court; and that in default of so doing, the decree shall stand and operate as and for the required conveyance.

REVERSED. DECREE RENDERED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Filed January 16, denied January 27, 1920.

PETITION FOR REHEARING.

(186 Pac. 581.)

On petition for a rehearing. DENIED.

Mr. Ernest C. Smith, for the Petition.

Messrs. Bronaugh & Carter, contra.

BURNETT, J.—5, 6. Since the rendition of the opinion in this case the defendants have filed a petition for a general rehearing of the case. They urge that when early in the negotiations they made the representation about the rentability of the property they themselves had no knowledge of the ordinance forbidding the use of the building simultaneously as an apartment house and as a garage. On this basis, they contend that the element of knowledge on their part of its falsity was wanting and hence that fraud was not to be predicated of the statement, although it afterwards came to their knowledge during the progress of the trade that their utterance in that respect was in fact untrue. One of the elements respecting a fraudulent statement is that the one making it must either know that it is false, or make it recklessly without any knowledge of its truth, and as a positive assertion: 20 Cyc. 13. On this point, the same text, at page 27, says:

“It is not always necessary that the speaker should actually know that his representation is false. If the statement is of a matter susceptible of accurate knowledge and he makes it recklessly, without any knowledge of its truth or falsity, and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraud-

ulent. The rule just stated applies, although the speaker honestly believes that the fact which he represents as existing actually does exist. In such a case it is apparent that he cannot believe in the truth of the statement he makes—that he knows the fact to exist—and the fraud consists in passing on his opinion or belief in the guise of positive knowledge. Consequently the speaker is not relieved from liability, although in making the assertion he relies upon trustworthy information.”

Here, the truth of the statements of the defendants was capable of exact verification or refutation. In fact, the representations were untrue and in morals and good conscience, which are the substance of equity, it was the duty of the defendants, having opened their mouths to speak on the subject of the availability of the property as a renting proposition, to disclose what knowledge came to the defendants afterwards about the error of their representation, while yet the negotiations were in progress. It would be quite another matter if they had not undertaken to give any information on that subject. It is one thing to conceal, and quite another merely to remain silent; and concealment may rest upon partial statement and partial silence.

The case of *Frederick v. Sherman*, 89 Or. 187 (173 Pac. 575), cited in support of the petition for rehearing, was an instance where the defendants actually had a patent right which they were seeking to sell to the plaintiffs. They made no representations about the solvency of the firm from which they acquired the right. They were not called upon to make any disclosure on that subject. In very truth, after the plaintiffs purchased the right they carried on business for some months before the common grantor failed. The opinion of Mr. Justice BENSON points out clearly that the parties dealt at arm's-length and that since no

statement on the matter of solvency of the defendants' grantor was made, there was no fraud. In *Caples v. Steel*, 7 Or. 492, the latter sought to escape from a contract which he had made to sell realty to Caples, because the latter had not disclosed to him the probable fact that there was a coal mine on the premises, of which the owner himself was ignorant. But the court held that Caples was not called upon to make any statement respecting the probability of finding coal in paying quantities on the land, and that, merely having remained silent on the subject, he was not guilty of fraud. *Shute v. Johnson*, 25 Or. 59 (34 Pac. 966), was decided upon the principle that the defendant was the confidential agent of the plaintiff when he made representations concerning the value of property which he sought to transfer to the plaintiff, and on account of this fiduciary relation his statements about value were material and, being extravagant, were fraudulent. The opinion in the instant case is not based upon any statements as to the value of the property which the plaintiffs acquired by the exchange. *Shute v. Johnson* is therefore not apropos in the present investigation. The principle is that if a party is so reckless as to make a statement which in fact is untrue and while the negotiations are in progress he discovers it is untrue, it is his duty to state the whole truth. The defendants' petition for a rehearing must therefore be denied.

The plaintiffs have filed a petition calling for a modification of the decree herein, so that it shall specifically award to them the chattels involved in the attempted exchange of properties between the parties. Answering this petition, it is suggested by the defendants for the first time, so far as disclosed by the record before

us, that a receiver had been appointed to take charge of the property *pendente lite*.

The complaint alleged that the plaintiffs had retained possession not only of the realty which they formerly owned but also of the personal property then on the premises and which was included in the exchange sought to be impeached, and that the plaintiffs had given notice of rescission of the contract on the ground of the fraud alleged to have been practiced upon them by the defendants. The custody of all the property by the plaintiffs was admitted by the answer. That pleading averred that the plaintiffs were insolvent; that a receiver should be appointed to take charge of the property, and that an injunction should be issued to prevent alienation thereof by the plaintiffs. No order appears in the abstract enjoining the sale of the property or appointing a receiver, and the only information we have about the existence of such an officer is a suggestion made in the defendants' answer to the plaintiffs' petition for a modification of our former decree. The effect of our former holding was to declare void the contract which the parties entered into, with the result that each was to be restored to his own. On the record put before us, stating as it did that the plaintiffs were still in possession of the personalty, there was no occasion expressly to declare them to be the owners thereof.

The statement of counsel for the defendants that the Circuit Court actually appointed a receiver is not controverted. For the purposes of this opinion, therefore, we assume that one was chosen and that he most likely incurred some expenses relating to the property. We have no data whereby we can settle his accounts. That is a matter properly judicable before the Circuit Court which appointed him.

Our former decree will be modified by adding thereto the declaration that the plaintiffs are the owners of the personal property to which they formerly held the title, and that each party shall return to the other all the personal property received from that other in the exchange or account for the value thereof in the settlement to be made by the Circuit Court. The cause will be remanded with directions to that court to settle the accounts of the receiver and the matter of the personal property. *Henderson v. Tillamook Hotel Co.*, 87 Or. 74 (169 Pac. 519), may be read with profit respecting the principles upon which the receivership should be adjusted.

REVERSED. DECREE RENDERED.

REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued December 17, 1919, affirmed January 27, 1920.

MILLER v. BINSHADLER.

(186 Pac. 545.)

Frauds, Statute of—Lessee may not Claim Possession to be Under Oral Contract to Purchase.

1. One who entered a parcel of land under a contract for a deed and at the same time received a written option to purchase a nearby tract, the option being a separate writing, and entered the second tract under a verbal lease the first year, giving the grantor one third of the crops, and under written leases for subsequent years, he cannot maintain that the contract for deed, and the written option constituted but one transaction, for the purpose of conveying to him the combined tracts at an agreed consideration, and that he was in possession of the second tract under an oral contract to purchase.

From Benton: GEORGE F. SKIPWORTH, Judge.

Department 2.

The plaintiffs were the owners of two tracts of land on an island in the Willamette River, on the Benton

County side, in the State of Oregon; one of 31 acres, upon which there were certain buildings, and the other of 24.1 acres. On March 23, 1912, after a personal inspection of the premises by the defendant William Binshadler, the plaintiffs entered into a contract with him for the sale of the 31-acre tract, by which they agreed to sell and that defendant covenanted to purchase and pay for the property at the stipulated price of \$2,695, of which \$25 was paid down and \$775 was paid on April 24, 1912, after the abstract was furnished and the title was approved by a local attorney. It appears that \$495 was the purchase price of certain personal property then on the premises and that the amount to be paid for the land was \$2,200, of which \$300 was "to be paid on or before each and every year" thereafter for four consecutive years, and \$695 to be paid on or before five years from date; and that each payment was to draw interest at 6 per cent per annum from the date of the agreement. It was further covenanted that William Binshadler should pay all taxes which had been assessed thereon since January 1, 1912, and all future taxes levied thereon, and should keep the buildings, fences and improvements in as good condition and repair as they were at the time the contract was executed.

The plaintiffs agreed that on the payment of the stipulated price with accrued interest "at the time and in the manner above specified" they would on demand execute and deliver to William Binshadler "a good and sufficient deed in fee simple, free of all legal encumbrances except taxes." For any failure to make such payments as they matured or to meet the taxes before they should become delinquent the agreement was to be considered void, all payments thereon forfeited and possession of the premises surrendered, or the plain-

tiffs might "elect to declare the whole of such purchase price due and proceed at once by foreclosure or otherwise to collect the same." Under this contract William Binshadler took and was to have possession of the premises so long as he complied with the terms of the agreement, which was duly witnessed and acknowledged.

Concurrent with the execution of that instrument the plaintiffs gave the defendant William Binshadler a written option to purchase the 24.1 acre tract at any time up to September 1, 1913, at the stipulated price of \$100 per acre, upon receipt of which "within the life of this option," they covenanted to give him "a good and sufficient deed and an abstract of title to same." The two tracts adjoined. The smaller was nearly all in cultivation and was more productive than the 31 acres. The defendants took possession of the 24 acres under a verbal lease for the first year. On March 22, 1913, Theodore Miller executed to the defendants a written lease of the 24.1 acre tract for the period of one year at a cash rental of \$100, to be paid on or before November 1, 1913, by which the defendants further agreed upon certain terms and provisions therein specified in regard to the manner of farming the land. Separate written leases with similar conditions were executed yearly thereafter at an agreed rental of \$100, to March 16, 1917, when the rental was raised to \$125. All of the stipulated yearly rental was paid at or about its maturity. Including the initial payment of the \$800 mentioned, made at the inception of the contract, the defendants have paid thereon the sum of \$1,813.73. Of this amount \$200 was paid on April 17, 1918, after which there was then due and owing on the purchase price of the 31 acres \$767.28, with interest at the rate of six per cent per annum.

The plaintiffs brought this suit to foreclose on that contract, asking for a decree against William Binshadler for the amount then due; and that if it should not be paid within thirty days from the entry of the decree that tract should be sold and the proceeds applied to the satisfaction of the plaintiffs' claim.

To bar her dower right, the defendant Theda Binshadler was made a party. For answer the defendants admitted the execution of the land sale contract for the 31-acre tract and the option to purchase the 24-acre farm, copies of which instruments were attached to and made a part of their pleading. They affirmatively allege "that both of said contracts constituted one transaction, made at the same time," for the purpose of conveying to these defendants the combined tracts at an agreed consideration of \$4,600; that false representations were made at the inception of the negotiations and that there were defects in the title, by reason of which the plaintiffs could not make the conveyance; that on September 21, 1913, the defendant tendered to the plaintiffs the amount of the purchase price, which was refused, and the plaintiffs failed to execute a deed; that they had paid the plaintiffs from time to time \$2,695, the full amount of the purchase price of the 31-acre tract, and that they are able, ready and willing to pay the amount asked for the other acreage when the title thereto is perfected and they receive a deed therefor. They in turn pray for a decree that the full purchase price of the 31 acres has been paid; that plaintiffs be compelled to make a good and sufficient deed of the 24 acres on payment to them of \$2,400 by the defendants; and that if plaintiffs refuse to accept the payment and execute such deed, the money be paid into court and that a decree be rendered in lieu of such conveyance. The reply denied all

the material allegations of the further and separate answer.

After the testimony was taken the court rendered a decree as prayed for in the complaint, from which the defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For respondents there was a brief and an oral argument by *Mr. H. E. Slattery*.

JOHNS, J.—The Circuit Court found that on April 17, 1916, there was yet due and unpaid on the land sale contract for the 31 acres, \$726.31, and that finding is sustained by the evidence. There is no competent evidence tending to show that the contract for the sale of the 31 acres and the option on the 24-acre tract should be deemed and treated as one contract for the purchase and sale of the combined properties. Those transactions were evidenced by separate written instruments. The purchase price of the 31-acre tract was \$2,200, and the option price for the other tract was \$2,400. At the time the contract of sale was executed there was a payment of \$800, and the instrument provided for the payment annually of \$300 for four consecutive years and \$659 to be paid within five years, each installment to draw interest from date. By its terms, William Binshadler covenanted to pay \$2,200 for the 31 acres. Any payment on the 24-acre tract was at his option and entirely within his discretion. He did not agree to make any payment whatever on that property. Miller could enforce payment against Binshadler for the purchase price of the 31 acres, but could not insist

upon payment for the 24 acres, because there was no agreement to pay, and no mutual obligation. From the nature of things, the two instruments could not be construed as one.

Again, for the first year the defendants took a verbal lease of the 24-acre farm for a crop rental of one third, and for the following years they had a written lease with an agreed cash rental. All payments on the purchase price were made on the 31-acre tract and nothing was paid on the 24 acres except the amount of the stipulated rental. Although it is true that the defendants have had possession of the latter realty, yet such holding was under the terms and conditions of the yearly leases and not by virtue of any contract of sale or purchase, either oral or written. The land sale contract expressly provided that they should have possession of the 31-acre tract so long as they complied with its terms. There is no such provision in the option on the other property.

In *Roberts v. Templeton*, 48 Or. 65 (80 Pac. 481, 3 L. R. A. (N. S.) 790, at page 810, of the notes in the last publication), numerous authorities are cited to the effect that a tenant in possession under a lease cannot claim, for the purpose of defeating the statute of frauds, that he is in possession under an oral contract to purchase. The rule is well stated in *Cole v. Potts*, 10 N. J. Eq. 67, where the court said:

“If a party relied on possession as part performance, he must show that he enjoyed that possession under the contract. If he had come in as a tenant, he must show by unequivocal proof that the tenancy had been abandoned, and that his possession as a tenant had been changed into that of a vendee under the specific contract he was seeking to enforce.”

In this case the vendee held as tenant, and failed to show a change of possession.

The defendants' claim of a right to purchase the 24 acres after the expiration of the option on September 1, 1913, is founded upon oral testimony only, and even that is indefinite and uncertain. There is no testimony tending to show that the defendants were ever in possession of the 24-acre tract under a contract to purchase. Their holding of that land was as tenants only.

The decree of the Circuit Court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Submitted on brief December 17, 1919, affirmed January 27, 1920.

CLATSOP COUNTY v. WUOPIO.

(186 Pac. 547.)

**Bail—Justification of Sureties may be Before Clerk—"Allowing Bail"
—"Admitting to Bail."**

1. "Admitting to bail," or "allowing bail," as it is sometimes termed, is a judicial act which purely ministerial officers, such as clerks of court, have no authority to perform, in the absence of an express statute; but by "allowing bail" or "admitting to bail" is not meant the formal justification, subscription, or acknowledgment by the sureties, the term first mentioned relating to the order determining that the offense is bailable and fixing the amount of undertaking, and "taking the bail" meaning the final acceptance or approval of it by the court, and an undertaking was valid although justification of sureties was before the clerk.

Criminal Law—Good Cause Shown for Continuance.

2. Where an attorney appeared on date set for trial and showed that defendant's attorney had enlisted in the United States army and was unable to be present at the trial, and that defendant had not been able to obtain counsel, and that absent counsel possessed all the facts constituting defense, the court had good cause for continuing the case for the next term of court, and defendant cannot complain; there being nothing to show that the continuance was against his wishes.

[As to absence of counsel as ground for continuance, see note in *Ann. Cas.* 1913C, 431.]

[As to war conditions as ground for continuance, see note in *3 A. L. R.* 333.]

From Clatsop: JAMES A. EAKIN, Judge.

In Banc.

This was an action to recover upon an undertaking of bail, executed by defendants, to secure the enlargement of one H. S. Gilnett, who had been indicted by the grand jury for obtaining by false pretenses the signature of a person to a promissory note, the false making of which would be forgery, the general description of the offense being in the following language:

“H. S. Gilnett is accused by the Grand Jury of the County of Clatsop by this Indictment of the crime of obtaining and attempting to obtain by false pretenses, with intent to defraud, the signature of a person to a promissory note, the false making of which is and would be forgery, committed as follows.”

Thereafter in the body of the indictment following a long statement of the particular circumstances of the alleged offense, which clearly showed the crime defined in Section 1964, L. O. L.

The defendant Gilnett was arrested upon a bench warrant issued out of the Circuit Court, and on the twenty-sixth day of February, 1917, was arraigned, waived time to plead, entered a plea of not guilty, and was, by order of the court, admitted to bail in the sum of \$500. The undertaking of bail was executed before the clerk and not in the presence of the circuit judge, and contained the usual affidavit as to the qualifications of the sureties, the certificate of the clerk that it was subscribed and sworn to before him on the twenty-sixth day of February, and the certificate of the judge that that it had been examined and approved by him on February 26, 1917.

Gilnett, after several continuances, finally failed to appear at the time fixed for trial and his default was

duly noted, his bail declared forfeited, and the district attorney was directed to bring an action on the undertaking against his sureties, the defendants herein.

The foregoing is a substantial summary of the complaint, which the testimony sustains in every particular.

The defendants answered by a general denial and at the close of the plaintiff's case moved for a nonsuit, which motion being denied, they stood upon such motion and introduced no evidence, whereupon the court made findings and entered judgment for plaintiff, from which defendants appeal. **AFFIRMED.**

For appellants there was a brief submitted over the names of *Mr. Enoch E. Mathison* and *Mr. J. J. Barrett*.

For respondent there was a brief prepared and submitted by *Mr. Ed. C. Judd*.

McBRIDE, C. J.—The defendants raised substantially several objections to plaintiff's recovery, which may be summarized as follows: (1) That the complaint does not show that Gilnett was charged with any crime known to the law; (2) that the undertaking is void because not taken, acknowledged before, and certified by the circuit judge in the manner prescribed by Section 1648, L. O. L., and (3) that the continuance granted by the court on June 29, 1917, was without the consent of the defendant and therefore in contravention of law, and Gilnett was thereby relieved from any further responsibility to appear.

As to the first objection it is sufficient to say that the complaint sets forth in full the indictment found against Gilnett and that in our judgment that indictment fully stated the offense defined by Section 1964,

L. O. L. Counsel for defendants have not pointed out any particular point wherein it is defective and the first objection cannot be sustained.

1. The second objection is more plausible and admits of serious discussion. It is apparent from the record that the court made an order admitting defendant Gilnett to bail in the sum of \$500. Admitting to bail or allowing bail, as it is sometimes termed, is a judicial act which purely ministerial officers, such as clerks of the court, have no authority to perform in the absence of an express statute: 3 R. C. L., p. 22, § 23. But by "allowing bail" or "admitting to bail" is not meant the formal matter of justification, subscription or acknowledgment by the sureties. The term first mentioned relates to the order determining that the offense is bailable and fixing the amount of the undertaking. By "taking the bail" is meant the final acceptance and approval of it by the court.

The justification and acknowledgment are purely ministerial acts and as to these the better authority seems to be that even if performed by or before an unauthorized officer, that fact will not invalidate the undertaking: 5 Cyc. 109.

In *State v. Hays*, 2 Or. 314, the court puts the undertaking of bail on a par with other simple contracts and uses this language:

"The undertaking prescribed by our statute is radically different in form and substance and retains nothing of the nature of the confession of a judgment or a recognizance. It is a simple contract, a conditional promise for the payment of money, to be sued upon as is a bond or promissory note.

"In such an undertaking when is the contract complete? When it is signed by the parties, placed in the hands of the magistrate, and the defendant discharged;

or when the magistrate shall have appended his certificate?

"The law positively requires a justification by affidavit before the defendant has a strict right to his discharge. But it has never been held that the want of the affidavit can be set up as a defense in an action upon the undertaking.

"The law makes it the duty of a magistrate to certify to the acknowledgment of a deed, and he may be liable if he neglects or declines to do so; but the deed is good between the parties before he certifies. In case of a deed the certificate of acknowledgment is taken as proof of the execution, but it has never been held that in the absence of a certificate, or in case of a defective one, it is error to prove the execution by parol."

In the present case the justification of the sureties was before the clerk, but the court approved the undertaking and therefore as a matter of law the judge and not the clerk took the bail. The undertaking was in statutory form; there is no question but that the sureties signed it and that by reason of its being given, the defendant Gilnett secured his discharge from custody. It does not lie in the mouths of the defendants to say that by reason of the fact that a mere ministerial act was performed by the clerk instead of the judge, they are discharged from liability.

2. The objection that the trial was postponed to a future day without good cause being shown, is untenable. The case was duly set for trial on June 29, 1917, and on that date the following order was made in the case.

"Now on this day came the defendant by G. C. Fulton, an attorney of this court representing and appearing on behalf of R. H. Rowland, and having shown the court that R. H. Rowland, attorney for said H. S. Gilnett has enlisted as a volunteer in the United States army, and is now at the Presidio and unable to be present at the trial of this cause, and that the defendant has

not been able to obtain counsel, and that said R. H. Rowland is possessed of all the facts constituting the defense, and it appearing to the court that it would be just to have this cause continued.

"It is, therefore, ordered by this court that this cause and the trial thereof be continued until the next term of court."

The reasons given constituted good cause for a continuance. The defendant having given an undertaking to appear on that very day the presumption is that he was there in accordance with its terms, and it does not appear that the continuance was against his wishes. On the contrary it appears that it was in his interest and for his benefit that the continuance was granted so that he would not be forced into trial without the assistance of counsel familiar with the facts in the case: *State v. Moss*, 92 Or. 449 (181 Pac. 347).

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Submitted on brief December 18, 1919, affirmed January 27, 1920.

MARTIN v. WEISS.

(186 Pac. 550.)

Landlord and Tenant—Tenant on Shares Surrendering Before Productivity cannot Recover of Landlord for Services.

1. Where the lessee of a dairy ranch, who was to share the profits with the landlord, surrendered possession before the ranch had become productive, he could not recover of the landlord for services rendered.

From Tillamook: **GEORGE R. BAGLEY**, Judge.

In Banc.

The complaint herein recites that on November 25, 1918, the parties entered into a contract whereby plaintiff leased from defendants a dairy farm in Tillamook

County, and makes a copy of the written lease part of the pleading. By its terms plaintiff was to conduct the dairy, selling its product to some cheese factory, dividing the proceeds of such sales equally with the landlord. The lease was to expire on October 1, 1919, with the privilege of a further lease of three years at the option of the plaintiff. The plaintiff entered into immediate possession, and so continued operating the farm until February 24, 1919, when by reason of friction arising between the landlord and tenant, "said parties, in consideration of the dissatisfaction that existed between them, mutually rescinded said contract hereinbefore referred to in paragraph I of this complaint, and the plaintiff thereupon surrendered possession of said leased property to the defendants, and the defendants accepted the same and took possession, and have been in possession of said property ever since said date."

It is further alleged that owing to the methods in vogue upon this farm the cows were practically all dry during the winter season, and that the productive and profitable period of each year is during the spring and summer months, and that therefore the plaintiff, during his brief possession, did not profit by his tenancy, and therefore seeks a recovery of \$189.39 expended for feed and supplies, and \$500 as the reasonable value of his services in caring for the leased property during his occupancy.

The answer admits the execution of the lease, the subsequent and mutual dissatisfaction of the parties, the alleged "rescission," and denies everything else. It is averred affirmatively, that by reason of plaintiff's incompetency and neglect, some of defendants' cows died, and other damage resulted, and that when possession of the property was surrendered by plaintiff,

it was agreed that plaintiff should pay to defendants the sum of \$300, and that such payment should be a final settlement of their affairs, and that the \$300 is not yet paid. Defendants do not ask for affirmative relief. A reply being filed, there was a trial by court and jury resulting in a verdict and judgment for plaintiff, and thereafter defendants filed a motion to set aside the judgment and for a new trial, which, after a hearing, was allowed by the court, from which order plaintiff appeals.

AFFIRMED.

For appellant there was a brief submitted over the names of *Mr. George P. Winslow* and *Mr. H. T. Botts*.

For respondents there was a brief prepared and submitted over the name of *Messrs. Johnson & Handley*.

BENSON, J.—1. Upon the trial of the case, defendants objected to the admission of any evidence in support of plaintiff's claims, for the reason that the allegations of the complaint do not constitute a cause of action. The objection was overruled and exception taken. When plaintiff had concluded the taking of his testimony and rested his case, defendants moved for a judgment of nonsuit upon the same ground, and thereafter moved for a directed verdict upon the same ground, both of which motions were denied. After judgment had been entered upon the verdict, defendants moved to have the same vacated and for a new trial, assigning as error the rulings above mentioned. A hearing was had and the court made an order setting aside the judgment and granting a new trial, which now presents to us the question as to whether or not the plaintiff's complaint states facts constituting a cause of action. The ultimate facts recited in the complaint are, that when the tenancy had ex-

isted for a period of three months, during which time there had been no accruing profits from the venture, the plaintiff, with the consent of his landlord, voluntarily surrendered his estate without exacting any terms or conditions therefor.

There is no allegation of eviction, or breach of the contract, by defendants, or anything to indicate that the surrender was other than voluntary. It is true that both the complaint and the answer allege a mutual rescission of the contract, but the rescission of a lease of real property necessarily involves a surrender: 2 Tiffany on Landlord and Tenant, § 187.

A surrender of a leasehold estate has the effect of extinguishing all the interest of the tenant in the term and all rights conditioned upon its continuance: 2 Tiffany on Landlord and Tenant, § 191; 16 R. C. L. 1157; 24 Cyc. 1378. A case strikingly in point is that of *Boyd v. Gore*, 143 Wis. 531 (128 N. W. 68, 21 Ann. Cas. 1263). This was a case wherein the plaintiff's assignor, a tenant, had vacated the premises before the end of the term, and thereafter assigned an alleged claim to plaintiff for services performed while a tenant. The chief item in such claim was a demand for plowing the land, from which no crop had been produced by reason of the tenant's surrender of the premises. Referring to this item, the court says:

"It is quite well settled that, where there is a voluntary surrender accepted by the landlord, all liabilities under the lease which would arise in the future had no surrender taken place are terminated, but liabilities which have already accrued remain unaffected: 2 Tiffany on Landlord and Tenant, 1348, 1349. Under no view of the case, therefore, can the plaintiff recover for the plowing done in the fall of 1907, for his contract required him to do it, and his voluntary surrender of

possession raises no obligation on the part of the landlord to pay for it."

The facts in the cases of this character are very different from those of contracts for sale or exchange of property, even for services rendered. The plaintiff was at no time in the employ of the defendants. He was at all times working for himself and it rested entirely with himself to remain in possession of the premises until such time as the profits should compensate him for his expenditures and labor, or to abandon the same and forego the opportunity to realize a benefit from the investment.

The judgment of the trial court must be affirmed.

AFFIRMED.

Argued December 5, 1919, affirmed January 27, 1920.

BEALL v. FOSTER.

(186 Pac. 554.)

Patents—Agreement to Give Right to Sell on Terms to be Agreed on not a Contract.

1. An agreement to give right to dispose of patented article, the terms and conditions to be agreed on later by the parties, but to be in the "bounds of reason and on about the same basis as has been customary in similar deals before, by other people," does not amount to a contract; the minds of the parties not meeting on any specific proposition.

From Multnomah: **ROBERT TUCKER**, Judge.

Department 1.

The complaint says that in Portland, Oregon, on or about June 10, 1908, the parties made and entered into a writing which is thus set out at large:

"Portland, Oregon, June 10, 1908.

"Mr. C. A. Foster,

"Portland, Oregon.

"Dear Sir:

"Referring to our conversation of this date at the Sargent Hotel, will say that the following is my understanding of the conversation, and if it is your understanding as well, please sign the acceptance on the bottom of this letter:

"First: You agree to sell me an undivided one-half interest in and to all patents that you have applied for and may obtain on the nestable culvert and also any patents or improvements that you might hereinafter be interested in, directly or indirectly on this same style culvert, for a consideration of two thousand dollars (\$2,000.00) to be paid by me to you at some convenient time, out of the money from sale of territory.

"Second: In addition to the above you agree to give me the exclusive right of disposing of the above described nestable culvert in the entire United States and such other foreign countries in which patents may be obtained, for the sale of the territory outright, shop rights or royalties, until the entire territory is all disposed of. The terms and conditions pertaining to this are to be agreed upon later by us, but are to be in the bounds of reason and on about the same basis as has been customary in similar deals before, by other people. Beall & Company to take such orders for this nestable culvert in competition with other nestable culverts now offered in the territory whenever it is necessary, and on which they are to be allowed the same commission as is allowed in their contract with the Security Vault & Metal Works, for the sale of the culvert. Such nestable culvert as they sell is to be manufactured by you at the Security Vault & Metal Works, at as low a price as it is possible, and in addition to that the Security Vault & Metal Works are to be paid a reasonable profit for the making of such culvert.

"All of the above conditions to date from this date. Believing that this is according to our talk, and is satisfactory to you, beg to remain,

"Yours very truly,

"JNO. S. BEALL.

"I hereby accept the above as correct.

"C. A. FOSTER."

The plaintiff says he fully performed all of the conditions of that instrument on his part to be performed, and in substance declares that as a result of his doings the defendant received money, the exact amount of which is unknown but is alleged to be \$9,500, and that "notwithstanding the plaintiff complied with all the requirements of the contract on his part to be done and performed, the defendant and the plaintiff failed to agree on the 'terms and conditions' referred to in said agreement, although said Beall was always willing to do so, and often requested the defendant so to do." He says, too, that the reasonable and customary compensation for such services is one half the amount the defendant received, "to wit, over the sum of \$4,500." The plaintiff avers finally in substance that the true amount due from the defendant cannot be ascertained without an accounting between them, in consequence of which he has no plain, speedy or adequate remedy at law, and therefore prays for an accounting between the parties.

The answer is a specific denial of all the allegations of the complaint. The court made findings and a decree in favor of the defendant, dismissing the suit, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Sinnott & Adams*, with an oral argument by *Mr. R. B. Sinnott*.

For respondent there was a brief over the names of *Mr. Richard W. Montague* and *Mr. George I. Brooks*, with an oral argument by *Mr. Montague*.

BURNETT, J.—1. No question is raised about the first subdivision of the instrument quoted in the complaint. It appears in evidence that the defendant assigned to the plaintiff one half of the nestable culvert patent and that, acting together, they organized corporations in Washington and Montana, putting in the use of the patent in those state as one half of the capital stock subscribed by them and residents there took the other half in each instance. In Utah and California they operated together in the employment of an agent who effected sales of the patent right, upon which certain royalties were received and divided by the plaintiff and the defendant. It appears also that the defendant sold his stock in the Washington and Montana corporations for considerable sums of money.

It is noted in passing that the letter purports to be the plaintiff's understanding of a certain conversation. In addition to this the defendant signed the memorandum at the foot, "I hereby accept the above as correct." Taken by its four corners, this amounts to no more than a memorial of uncompleted negotiations thus far had between the parties. The kernel of the controversy is found in this excerpt from the second subdivision of the letter:

"The terms and conditions pertaining to this are to be agreed upon later by us but are to be in the bounds of reason and on about the same basis as has been customary in similar deals before, by other people."

Whether such language as this amounts to a contract or not, was considered by this court in *Holtz v. Olds*, 84 Or. 567 (164 Pac. 583, 1184), and it was there held that

an agreement to make a contract in the future is not binding unless all the terms and conditions are agreed upon and nothing is left to future negotiations.

It is substantially admitted in the argument that an agreement to agree does not constitute a contract. The reason for this is plain; for, unless the minds of two parties have met on the same proposition there can be no agreement. The question before us is not purely one of construing a contract. We are called upon to determine whether there was any contract at all. The language of the parties postpones agreement to a later date. In the face of their own words, we cannot say that their minds met at the time on any definite proposition. We cannot make for them a contract as of that date, when they themselves have said one was to be made thereafter and that, too, on terms not specified. The plaintiff is not seeking to recover on a *quantum meruit* for services rendered. He declares on a written instrument which he calls a contract and which he sets out *in haec verba*. His whole case is founded on the theory that on the date of that instrument he and the defendant made a complete contract which was then and there an enforceable compact. Their own words refute this theory and refer the close of negotiations to some indefinite later date. With the convention between the parties in this state of uncertainty, the plaintiff essays in effect to import into the so-called contract a stipulation not found there, and then to recover upon it as he would thus reform it. It is indeed true that that is certain which can be made certain, but for all that there must be a standard of certainty in contemplation by the parties. To say that the terms must be "in the bounds of reason and on about the same basis as has been customary in similar deals before, by other people," is not certain. The

conduct of the parties as disclosed by the evidence does not in the least indicate that either of them relied upon or considered the second clause of the contract as imposing any obligation.

Much reliance is placed by the plaintiff on the case of *Olympia Bottling Works v. Olympia Brewing Co.*, 56 Or. 87 (107 Pac. 969). In that instance the plaintiff had the contract for handling the beer manufactured by the defendant for some compensation described in the agreement. That instrument contained this clause:

“At the close of the five-year period covered hereby the second party shall have the option of continuing this agency for another five years, but the prices of the beer shall be revised, but not exceeding the prices for beer ruling at that time; this agreement to take place on the first day of March, 1902.”

In substance, the decision of the court, Mr. Justice EAKIN dissenting, turned upon the principle that the phrase, “prices ruling at that time,” meant the market prices, which could be established by competent evidence, so that the language quoted amounted to a contract *in praesenti*, providing an ascertainable standard as one of its terms, to operate in the future.

An examination of the precedents cited by the plaintiff shows that the instrument declared upon in each instance contained terms then agreed upon as a canon by which possible future differences should be adjusted. Here, the parties directly declined to agree at the time of signing the writing, by expressly postponing that feature to a later date. In brief, the minds of the parties did not meet on any specific proposition, and hence on primary principles there was no contract.

The Circuit Court was right in its conclusion and its decree must be affirmed.

AFFIRMED.

BEAN, BENSON and HARRIS, JJ., concur.

Argued November 26, 1919, affirmed as modified January 27, 1920.

THIMSEN v. REIGARD.*

(186 Pac. 559.)

Corporations—Corporate Property not to be Sold in Controversy Between Stockholders.

1. In a suit by a stockholder against other stockholders and against the corporation to have a trust declared in lands belonging to the corporation, etc., arising out of fraud of defendant stockholders, the property of the corporation will not be sold, where another stockholder, not a party to the action, will be prejudiced, and plaintiff on prevailing, if satisfaction cannot be had from the other stockholders under the judgment, will be given a lien for his proportionate share in the corporation; fraud having been false representations as to cost of the corporate property.

Joint Adventures—Rights as Between Members Controlled by Principles of Partnership.

2. The rights of joint adventurers in matters between themselves are governed by the principles constituting and controlling the law of partnership.

[As to the mutual rights and liabilities of parties to joint adventure, see notes in 17 Ann. Cas. 1022; Ann. Cas. 1912C, 202; Ann. Cas. 1916A, 1210.]

Joint Adventures—Member may not Make Secret Profit.

3. Where plaintiff and defendant entered into a joint adventure consisting in purchasing land for resale, defendant had no right to purchase the land from himself, either directly or indirectly, or to make profit on the deal, except with the full knowledge and consent of plaintiff.

Joint Adventures—Burden on Member to Show Good Faith.

4. Where plaintiff and defendant entered into a joint adventure consisting in purchasing certain land for resale, defendant to act as plaintiff's agent in purchasing the property, the burden of proof was upon such defendant, in an action by plaintiff for an accounting on account of secret profits made by him, to show that he fully informed plaintiff of all the facts within his knowledge bearing upon the transaction.

Principal and Agent—Agent may not Make Secret Profit.

5. An agent who makes a secret profit in the execution of his trust as such agent may be compelled to account to his principal.

*On effect of secret advantage to one member of a joint adventure, see note in 50 L. R. A. (N. S.) 1046.

Principal and Agent—Knowledge Acquired by Agent in Prior Transaction Knowledge of Principal.

6. The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent in the particular transaction, provided it be of such character as he may communicate to his principal without breach of professional confidence.

From Coos: JOHN S. COKE, Judge.

Department 2.

The plaintiff, Katharine Thimsen, brought this suit against Charles I. Reigard and Fannie L. Reigard, his wife, seeking to have defendants declared to be trustees for plaintiff of a portion of certain lands and shares of stock standing in their names. Plaintiff also instituted a suit against the Reigards and the Laurel Investment Company to compel an accounting and restoration to the company of certain moneys and property. Issues were made and the two suits were consolidated and tried as one, by consent of counsel for the parties. The trial court rendered a decree in favor of plaintiff in each suit, and defendants appealed.

AFFIRMED AS MODIFIED.

For appellants there was a brief over the names of *Mr. George Watkins* and *Mr. Charles I. Reigard*, with an oral argument by *Mr. Watkins*.

For respondents there was a brief over the names of *Mr. William T. Stoll* and *Mr. Dwight E. Hodge*, with an oral argument by *Mr. Stoll*.

BEAN, J.—After reading the testimony we find that the record discloses the following facts: During the time of the transactions in question in this suit, Kath-

arine Thimsen, the plaintiff, was a resident of the State of Minnesota, and had never been in the county of Coos, Oregon. The defendant, Charles I. Reigard, was an attorney at law and had done some business for plaintiff's family, in Minnesota, where he resided until about 1910. On January 18, 1910, Mr. Reigard had visited Coos Bay and procured two options to purchase two 40-acre tracts of land from the Archer Land Company for \$4,000 each, or a total price of \$8,000. Pursuant to such options the Archer Land Company, on January 17, 1910, authorized the execution of deeds for the tracts of land and executed a deed to one 40-acre tract, leaving the name of the grantee therein blank, and forwarded the same to a bank in Owatonna, Minnesota, to be delivered upon the payment, by Charles I. Reigard of \$4,000. February 16, 1910, the Archer Land Company, at the request of Mr. Reigard, executed a deed for the remaining 40-acres of the land to B. E. Lewis, the sister of defendant Fannie L. Reigard, in trust for plaintiff, Katharine M. Thimsen, and Charles I. Reigard, and delivered the same to defendant Charles I. Reigard.

January 18, 1910, plaintiff appointed defendant, Charles I. Reigard, her agent to purchase an interest in the two tracts of land. It was to be purchased by them jointly. For that purpose she delivered to him \$3,600 in cash and a promissory note for \$900, aggregating \$4,500, when they signed the following agreement in duplicate:

“Owatonna, Minn., Jan. 18th, 1910.

“Received from K. M. Thimsen, cash in the amount of \$3,600.00 and one promissory note for \$900.00 dated Jan. 18th, 1910, to be disposed of as follows: First to purchase an undivided one-half interest with myself in

the south half of the east half of the northeast quarter of section one, township 26, south, range 13 west of the Willamette Meridian, said land to cost \$2,500.00, that is, the half interest, and the whole thereof \$5,000.00.

"Two thousand dollars thereof to be used to secure an interest in a corporation to be formed to purchase the northeast quarter of the northeast quarter of said section one, at a cost including expense of incorporation, etc., of not to exceed \$5,500.00. The interest in said corporation to be evidenced when formed by twenty shares of stock of the par value of \$100.00 each, to be issued to the said K. M. Thimsen immediately after said corporation is formed.

"But should I be unable to purchase said property as above set forth, then so much of said sum as is not used to be returned to the said K. M. Thimsen.

"It is understood that either of the above properties shall be purchased at the terms and for the purpose stated, and one may be purchased without the other, but if either cannot be bought as above set out, the amount advanced to make the purchase of that tract which cannot be bought shall be returned to the said K. M. Thimsen.

"To all of which the parties hereto agree."

At that time Charles I. Reigard represented to the plaintiff that the two tracts of land could not be purchased for less than \$10,000, and afterwards represented to the plaintiff that he had paid the Archer Land Company \$10,000 for the land. He suppressed from plaintiff the actual price paid, and the fact that the Archer Land Company had authorized the execution of deeds for a purchase price of \$8,000; and that one of the deeds had already been executed and sent to Owatonna, Minnesota, to be delivered as above stated. Plaintiff had confidence in defendant, Charles I. Reigard, and believed his representations until a short time before the commencement of this suit.

The defendant, Charles I. Reigard, paid the Archer Land Company the sum of \$8,000 and no more for the lands, and used therefor the \$4,500 given him by the plaintiff for that purpose, and the further sums of \$142 and \$62.50; which latter sums the plaintiff advanced to the defendant on the false representation made by him that they were necessary to complete the purchase of the lands.

When the deed sent to Owatonna, Minnesota, conveying the south one half of the tract, was delivered to the defendant, Charles I. Reigard, he filled in the names of Katharine M. Thimsen and Fannie L. Reigard, his wife, as grantees. His wife's name was inserted without the knowledge or consent of plaintiff. During all of the time of the dealings Charles I. Reigard acted as the agent of his wife, and she had notice of the relations existing between him and plaintiff. The plaintiff furnished \$4,704.50 of the entire purchase price of \$8,000 or 58.8 per cent thereof and she thereby became the equitable owner of an undivided 58.8 per cent of the land. Afterwards, the land deeded to plaintiff and Fannie L. Reigard was divided, each taking title to twenty acres. In the fall of 1910, the Laurel Investment Company was incorporated with a capital stock of \$5,500, divided into shares of \$100 each, which were issued as follows: 29 shares to Fannie L. Reigard, 1 share to Charles I. Reigard, 20 shares to Katharine M. Thimsen, and 5 shares to W. B. Clarkson. The Clarkson shares were afterwards assigned to H. A. Stensvad. The other 40-acre tract was conveyed by B. E. Lewis, to the Laurel Investment Company; and the land was afterwards platted into lots and blocks, as Laurel Addition to Coos Bay. Miss Thimsen paid her portion of the main expense thereof.

Plaintiff received 4/11 of the capital stock of the corporation which is equivalent to 14.53 acres of the land purchased, which with the twenty acres deeded to her is equivalent to 34.54 acres of land, or 43 per cent of the entire tract purchased. For \$2,000 of the money furnished by plaintiff, twenty acres were conveyed to her, leaving to be put into the corporation \$2,704.50 of her money.

About the time of the commencement of the negotiations, defendant sold to Bossart a part of the land afterwards platted as block 4 in Laurel Addition to Coos Bay, for \$3,000, upon which there was paid \$1,141.11; ten lots being conveyed to Bossart by a subsequent arrangement, and the contract canceled as to the remainder. These lots belonged to the corporation. From this amount of \$1,141.11, collected by Charles I. Reigard, should be deducted his bill upon which there is a balance of \$275.46 due him from the company. Reigard purposely suppressed the fact of the sale to Mr. Bossart from the plaintiff and has not accounted to her or the corporation therefor. The bill was presented and allowed by the directors of the corporation, September 8, 1917, and appears to be just and equitable except as to \$10 thereof, which is offset by the amount which is justly claimed in the larger account. This leaves a balance of \$865.65, one half of which or \$432.85, according to the findings of the trial court belongs to plaintiff. Adding this amount to the cash furnished by plaintiff, makes an aggregate sum of \$3,137.35, the amount of plaintiff's interest in the corporation. This equals 78.1 per cent of the entire amount invested by the corporation in the 40-acre tract of land. Plaintiff is entitled to 78.1 per cent of the 55 shares of capital stock of the Laurel Investment Company, or 42.95 shares of the face value of \$4,295. Five

shares were issued to W. B. Clarkson and transferred to H. A. Stensvad, of the face value of \$500. Defendants, the Reigards, are entitled to 7.05 shares of the face value of \$705. The total number of shares is 55, par value \$5,500.

January 3, 1912, defendant, Charles I. Reigard, presented to the corporation a bill for services and expenses against the corporation from February 2, 1910, to July 10, 1911, amounting to \$1,837.48, upon which was credited \$500 received for the Clarkson shares of stock and \$90 received from the Archer Land Company on account of surveying, leaving a balance claimed of \$1,247.48. No part of this claim is supported by proof showing that it is equitable or just, except the sum of \$11.58; therefore the balance of Reigard's account above allowed, \$275.46, should be in full settlement of both of the claims for services and expenses made by him against the corporation, and he should be required to convey to the Laurel Investment Company, twenty lots in block 4 of Laurel Addition to Coos Bay, the title to which is now held by him, being all of the lots in said block 4 not heretofore conveyed to A. S. Bossart.

The defendants, Charles I. Reigard and Fannie L. Reigard, therefore held in trust for plaintiff 22.95 shares, of the par value of \$2,295, which they should assign and transfer to plaintiff on the stock books of the Laurel Investment Company.

1. The Circuit Court found that the equities of the case were with the plaintiff. This is amply supported by the testimony. The court awarded the plaintiff a decree for the amount of money she had furnished to purchase the two tracts of land, \$1,264, together with interest thereon from January 18, 1910; and after adding a portion of the amount collected from Bossart, declared the amount due plaintiff to be an equitable

lien upon the lands owned by the defendant, Laurel Investment Company, and ordered the land sold to satisfy the amount due plaintiff. It is assigned that it was error to order the land of the corporation sold; for the reason that there were five outstanding shares held by H. A. Stensvad who is not a party to this suit, and that it would be detrimental to his interests to have the land so sold. We think this point is well taken; therefore we change the form of the decree.

Miss Thimsen invested her money in the purchase of the land. She appears to have been willing to speculate on the value of the land at the price it was purchased. At one time the defendants, Mr. and Mrs. Reigard, offered to return her investment with interest, if she so elected. We therefore think she should be adjudged to be the owner of her proportionate share of the capital stock in the corporation without ordering the land sold, and the shares transferred to her, if that can be accomplished.

In the event the defendants, Mr. and Mrs. Reigard, cannot transfer a sufficient amount of the capital stock to plaintiff for her share, the following computation should be applied. Plaintiff is entitled to \$3,137.35 interest in the land of the corporation out of the \$4,000 invested therein. She received an equivalent of $\frac{4}{11}$ of \$4,000, equal to \$1,454.54. The difference between this amount and the interest to which plaintiff is entitled amounts to \$1,682.81. In case the shares of stock cannot be transferred, as above ordered, plaintiff should have an equitable lien in the sum of \$1,682.81, upon that portion of the land, the title to which is in the name of the Laurel Investment Company, represented by the 30 shares of capital stock held in the names of defendants, Fannie L. Reigard and Charles

I. Reigard, not including the interest represented by the 5 shares of stock held by H. A. Stensvad nor the lots sold and conveyed to parties other than Charles I. Reigard. Such interest in the land and shares of stock of defendants, Fannie L. Reigard and Charles I. Reigard, should be sold to satisfy the same. This would not affect the shares of stock held by Stensvad, except indirectly.

The trial court found, and there is abundant evidence supporting such finding, that after the organization of the corporation the same was dominated and controlled by the defendant, Charles I. Reigard. He was the agent and representative of defendant, Fannie L. Reigard, and dictated the policy of the company and managed and directed its affairs, and as such had notice and knowledge of all of the facts in relation to the company referred to herein and in the findings of the Circuit Court, and of the fraud practiced upon the plaintiff. The corporation and Fannie L. Reigard acquired such knowledge and notice through the defendant, Charles I. Reigard, and had the same at the time of the conveyance of the land to the corporation and the issuance of the 29 shares of stock to Fannie L. Reigard.

The Circuit Court found that the balance of the bill of defendant for \$1,837.48, upon which a balance of \$1,247.48 was claimed by defendant, Charles I. Reigard, was fraudulent and unwarranted. In this we concur. In addition to the \$590 credited upon the latter bill, plaintiff also received payments for lots sold amounting to \$200, making a total amount of \$790 to offset the expenses of the corporation, such as license fees, taxes, and conducting the business.

The large account, \$1,837.48, upon which there was a balance of \$1,247.48 claimed by Reigard, was allowed

by Mr. and Mrs. Reigard, acting as directors of the corporation.

At the inception of the dealings between plaintiff and defendant, Charles I. Reigard, fiduciary relations between them were created, as shown by the agreement of January 18, 1910, set forth above. Defendants, the Reigards, are precluded from contradicting this covenant. The writing shows that Charles I. Reigard received from plaintiff \$3,600 in cash, and a note for \$900 which was afterwards paid, to purchase an undivided one-half interest in eighty acres of land, forty acres of which was to be secured for a corporation to be formed. Reigard was to purchase the interest as her agent in their joint adventure.

2-4. The modern decisions indicate that the courts regard the rights of joint adventurers, in matters between themselves, as governed by the principles constituting and controlling the law of partnership: 15 R. C. L., p. 500, § 1. We quote from page 501, Section 3, of that volume:

“The relation between joint adventurers is fiduciary in its character, and the utmost good faith is required of the trustee to whom the deal or property may be intrusted, and such trustee will be held strictly to account to his coadventurers, and he will not be permitted, by reason of the possession of the property or profits, whichever the case may be, to enjoy an unfair advantage, or have any greater rights in the property, by reason of the fact that he is in possession of the property or profits as trustee, than his coadventurers are entitled to. The mere fact that he is intrusted with the rights of his coadventurers imposes on him the duty of guarding their rights equally with his own, and he is required to account strictly to his coadventurers, and if he is recreant to his trust, any rights they may be denied are recoverable.”

See *Templeton v. Bockler*, 73 Or. 494 (144 Pac. 405).

Under the agreement, Mr. Reigard had no right to purchase the land from himself, either directly or indirectly, or to make a profit of \$25 per acre on the deal, except with the full knowledge and consent of his principal, Miss Thimsen. The burden of proof is upon Reigard, as such agent, to show that he fully informed Miss Thimsen, his principal, of all the facts within his knowledge bearing upon the transaction. This he failed to do: 2 C. J., p. 703, § 361; *Jones v. Sheffler* 77 Or. 284 (151 Pac. 463); *McNiel v. Holmes*, 77 Or. 165 (150 Pac. 255).

5. The general rule is based upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interests and integrity. It serves as a restraint upon all agents: *Michoud v. Gired*, 4 How. (U. S.) 503 (11 L. Ed. 1076, see, also, Rose's U. S. Notes). Miss Thimsen was betrayed by her agent into paying for the property in excess of the price for which Reigard, her agent, obtained it; and is entitled to recover. An agent who makes a secret profit in the execution of his trust, as such agent, may be compelled to disgorge: *Sandoval v. Randall*, 222 U. S. 161 (56 L. Ed. 142, 32 Sup. Ct. Rep. 48, see also, Rose's U. S. Notes). In the latter case the syllabus reads thus:

"Where one agrees to act as agent to purchase property at not exceeding a specified price, he cannot avail of an unexpired option antedating the employment to purchase the property at a less price himself and make the difference."

6. The rule as to notice is laid down in the case of *The Distilled Spirits*, 11 Wall. 356, at page 366 (20 L. Ed. 167, see, also, Rose's U. S. Notes), in effect as follows: The rule that notice to the agent is notice to

the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent in the particular transaction, provided it be of such a character as he may communicate to his principal without breach of professional confidence: See *McIntyre v. Pryor*, 173 U. S. 38, 52 (43 L. Ed. 606, 19 Sup. Ct. Rep. 352, see, also, Rose's U. S. Notes). Mrs. Reigard must be held to have had legal notice of the fraudulent conduct of her husband and agent, in the matters pertaining to the purchase of the land and the corporate transactions.

The two decrees of the lower court will therefore be modified, and one entered declaring the plaintiff, Katharine M. Thimsen, to be the equitable owner of 42.95 shares of the capital stock of the Laurel Investment Company, of the face value of \$4,295; 22.95 of which shares are now held by Fannie L. Reigard and Charles I. Reigard in trust for plaintiff; that Charles I. Reigard and Fannie L. Reigard be ordered to assign and transfer to plaintiff 22.95 shares of capital stock of the Laurel Investment Company, a corporation, which are held in trust by them for plaintiff; in the event that said 22.95 shares of stock cannot be transferred to plaintiff free and clear of any claim thereto, then in addition to the 4/11 interest of plaintiff in the land of the Laurel Investment Company, represented by her twenty shares of the capital stock, the plaintiff is entitled to an equitable lien for the sum of \$1,682.81 upon the lands of the Laurel Investment Company, represented by the thirty shares of capital stock held by defendants, Charles I. Reigard and Fannie L. Reigard; that such lien be foreclosed and the interest in said land represented by said thirty shares of stock

held by defendants, the Reigards, be sold upon execution to satisfy this decree; that the defendants Charles I. Reigard and Fannie L. Reigard, his wife, be ordered to make, execute, and deliver to the Laurel Investment Company, a deed of conveyance of all of block four, in Laurel Addition to Coos Bay, excepting ten lots heretofore conveyed to A. S. Bossart; and in the event of failure to so execute such deed, this decree shall stand as and for the same, and be recorded as such conveyance; that each party pay their own costs of this suit in this court; the costs in the lower court to be paid as there adjudged.

As above modified, the decree of the lower court is affirmed.

AFFIRMED AS MODIFIED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued December 5, 1919, reversed and decree rendered January 27, 1920.

TYLER v. OBIAGUE.

(186 Pac. 579.)

Waters and Watercourses—Lower Appropriator cannot Compel Excessive Use by Upper Owner to Get Surplus.

1. A lower appropriator has no right to compel one who has taken out water above him to maintain an excessive use of water so that the former may get the benefit of the surplus, although the upper appropriator has permitted the lower appropriator to construct a ditch on his land to convey surplus waters.

From Harney: DALTON BIGGS, Judge.

Department 1.

The lands of all the parties to this suit lie in Warm Springs Valley in Harney County and the general slope there is easterly and southeasterly across all

the property involved. The western boundary of the plaintiffs' land coincides with the eastern limits of the lands of the defendants. Silver Creek is a stream running from northwest to southeast. Cote Slough is a defluent of Silver Creek and runs southeasterly through the western part of the lands of the defendants. In that region the spring thaw comes sometimes in the latter part of February, but usually in the month of March. The result is that Silver Creek rises very rapidly, filling Cote Slough to overflowing, so that the water from the slough spreads all over the lands in question to such an extent that, as described by one of the witnesses, it becomes practically a lake. This condition continues usually from a month to six weeks, when the waters begin to subside and settle into depressions or swales which exist in the floor of the valley.

The predecessor in interest of the defendants put a dam in Cote Slough on his own premises, prior to the time that the plaintiffs took title to their lands, and diverted water therefrom for the purpose of irrigation after the spring floods had gone down. He conducted it part way across the present holdings of the defendants. By means of check dams in the ditch and levees across the depressions on his premises he caused the water to spread out over his lands after the flood had subsided and the water in Cote Slough was within its banks. This is the customary method of irrigation in that country and was the only practical way by which crops could be raised. Later on, the plaintiffs dug a ditch from one of the swales in the eastern margin of the defendants' present holdings for the purpose of carrying the flood waters over their lands for use in irrigation. Still later, defendants' predecessor in interest commenced the construction of a ditch across his

land, leading from the eastern terminus of the old ditch to his eastern boundary. He plowed some furrows and gave permission to the plaintiffs to scrape out the earth and finish the construction of the ditch for the purpose of more quickly conveying the flood waters upon the plaintiffs' lands. The plaintiffs availed themselves of this privilege and completed that ditch, connecting by means thereof the original ditch tapping the slough and the one dug mainly on their own ground, so that now there is a continuous line of ditch from Cote Slough across the lands of both plaintiffs and defendants.

It is charged by the complaint, in substance, that the defendants have assumed control over this third or connecting ditch, and have put into it check dams and like obstructions for the purpose of spreading the water over their lands. The plaintiffs bring this suit to enjoin any interference with that part of the waterway; to prevent the defendants from checking or stopping on their own land the flow of water through the natural swales and depressions to and upon the lands of the plaintiffs; and to obtain a decree declaring the plaintiffs to be the owners of the connecting ditch and of sufficient waters of Cote Slough for the irrigation of their lands.

The complaint is traversed in material particulars and the defendants claim that by virtue of their purchase from the original appropriator they are entitled to the water diverted by artificial means from Cote Slough, and that they further have the right by use of check dams put in the connecting ditch to divert that water upon their own lands for purposes of irrigation. They claim, too, that the plaintiffs are estopped to make the contention of their complaint, because when the defendants purchased the land they interviewed

the plaintiff S. F. Tyler, who told them substantially that all he claimed was to get the flood waters that spread over the whole vicinity. The defendants allege that in the years 1916 and 1917 the plaintiffs tore out the checks in the ditch after the flood waters had subsided, with the result that all the water was drained from the defendants' land and their crops were injured for want of irrigation, to their damage in the sum of \$750. The new matter in the answer was controverted by the reply.

The Circuit Court passed a decree to the effect that the plaintiffs are entitled to the use of water from Cote Slough during the spring overflow; that as soon as that subsides and all the water is needed by defendants for irrigation, the latter are authorized to control the water and to use it upon their premises. The court reserved the right to appoint a competent and suitable individual to administer the decree, and also decreed that the plaintiffs and defendants have a joint right to the use of the ditch and dam in Cote Slough. The defendants appeal.

REVERSED.

For appellants there was a brief over the names of *Messrs. McCamant, Bronaugh & Thompson*, with an oral argument by *Mr. Wallace McCamant*.

For respondent there was a brief and an oral argument by *Mr. J. W. Biggs*.

BURNETT, J.—The predecessor of the defendants in title was W. B. Parker, who is a brother of Hattie May Tyler and brother-in-law of the other plaintiff, S. F. Tyler. Admittedly, Parker put his dam into Cote Slough and dug the first ditch before the Tylers appeared on the scene. The plaintiffs claim nothing

but the right to use the flood waters that come upon their premises. Parker was using these flood waters for irrigation purposes prior to the time the Tylers began to irrigate. This was accomplished in part by building small dikes or levees across the general course of the swales, so as to cause the water to spread over the ground. It appears clearly by the testimony that after Parker had plowed some further extensions of his ditch to his eastern boundary he gave the Tylers permission to scoop out the ditch for the purpose of more quickly conveying the flood waters to their land than it would come down by the swales. Parker is not disputed in his testimony that this was only to apply to the flood waters and that, so far as the water diverted from Cote Slough by means of the dam was concerned, he had a right to put into the connecting ditch such obstructions as would enable him to cause the water to spread out over his own land.

It thus appears that all the plaintiffs have is a right to use the surplus remaining after the lands of the defendants are irrigated, which flows on past those tracts to and upon the lands of the Tylers. The plaintiffs did not acquire any right whatever in the dam in Cote Slough, or to the ditch originally constructed by Parker, and all they secured in the connecting ditch was the right to have the flood waters flow through it. When they subsided and the coming of the water from Cote Slough depended upon the dam, the plaintiffs had no further right to any of the artificial means of diverting the water.

As taught in *Hill v. American Land & Livestock Co.*, 82 Or. 202 (161 Pac. 403), a lower appropriator has no right to compel one who has taken out water above him to maintain an excessive use of water so that the former may get the benefit of the surplus. This is

what the plaintiffs are plainly seeking to accomplish and what the decree of the Circuit Court allows them to do. The testimony of Tyler himself is that all he claims is the right to use the surplus flood waters after they have flowed upon his lands. What Parker gave him was evidently a mere license for his accommodation and conferred no privilege affecting anything more than the flood waters.

The testimony upon which the defendants claim damage for interference with their check dams is very meager and, in our judgment, not sufficient for us to form an intelligent estimate of the amount of damage. Upon consideration of the whole testimony and the record in the case, we are of the opinion that the Circuit Court was in error and that a decree should be rendered here, reversing that of the Circuit Court and declaring the defendants to be the owners of the dam in Cote Slough and the ditch leading therefrom and across their entire premises; and that they have a right to divert the water therefrom and cause it to spread over their grounds by means of such dikes and levees as may accomplish the purpose, provided, however, that they do not prevent the surplus flood water from flowing upon the lands of the plaintiffs; and also subject to the condition that during the flood season while the water overflows the banks of Cote Slough independent of the dam, the plaintiffs shall have the free use of the connecting ditch hereinbefore mentioned, for the conduct of flood waters upon their lands. The defendants are entitled to the costs and disbursements in this court, but neither party shall recover other costs or disbursements. REVERSED. DECREE RENDERED.

BEAN, BENSON and HARRIS, JJ., concur.

Argued November 19, 1919, affirmed January 27, 1920.

COLLINS v. LONG.*

(186 Pac. 1038.)

Wills—Testamentary Capacity not Lost by Guardianship.

1. One under guardianship of his person and estate does not lose his right to make a testamentary disposition, if he retains sufficient mental capacity to execute a will.

Wills—Testamentary Capacity of Aged Testator Under Guardianship Shown by Evidence.

2. Evidence *held* sufficient to show that aged testator, under guardianship of his person and estate, possessed testamentary capacity.

Wills—Evidence Insufficient to Establish Undue Influence.

3. In a proceeding to set aside a will of an aged testator under guardianship in favor of a daughter, who took care of him, evidence *held* insufficient to establish undue influence on the part of the daughter and her husband.

From Linn: GEORGE G. BINGHAM, Judge.

Department 1.

This is a proceeding instituted to set aside the last will and testament of Samuel G. Collins, deceased, upon the grounds that at the time of its execution the maker was, by reason of his mental condition, incompetent to make a will. The petition of the plaintiffs is long and contains recitals of many evidentiary facts, which, so far as they are of importance here, are sufficiently referred to in the opinion. The defendants answered the petition and a trial was had in the County Court of Linn County, resulting in a decree setting aside the will. Upon an appeal to the Circuit Court, this decree was reversed and one entered in favor of the defendants, from which decree this appeal is taken.

AFFIRMED.

*The question as to what is testamentary capacity is discussed in notes in 27 L. E. A. (N. S.) 2; L. E. A. 1915A, 444. **REPORTER.**

For appellants there was a brief and an oral argument by *Mr. N. M. Newport*.

For respondents there was a brief and an oral argument by *Mr. H. H. Hewitt*.

BENSON, J.—There are two questions now presented for our consideration. The first is, Was Samuel G. Collins, on June 9, 1916, mentally competent to make a will? The second is, Was such will the result of undue influence, exerted upon the testator by the defendants Ada L. Long and her husband John H. Long?

The history involved in the investigation of the case, as gleaned from the pleadings and the testimony, is about as follows:

Samuel G. Collins, who was 94 years of age at the time of the execution of the document tendered for probate as his last will and testament, had been married twice, his first wife having died after bearing two children who still survive, being the defendants Ada L. Long and John R. Collins. Subsequently he married the plaintiff Laura A. Collins, who survives as his widow, by whom he had six children who survive, and are plaintiffs here, together with five grandchildren who are the offspring of a deceased daughter. Both marriages occurred in Iowa. The family moved to Oregon in 1875, where the deceased purchased the farm which constitutes practically all of the estate involved in this litigation. It appears that on April 25, 1877, the defendant Ada L. Long, who was then, according to her own testimony, fifteen years of age, and according to her stepmother, seventeen, was, for some reason which the record does not undertake to explain, driven from home, penniless, and forbidden to return, and thereafter the mention of her name in the household

was tabooed. Thereafter, according to evidence offered by the plaintiffs, strangers, within the next two or three years, wrote to the girl's father, urging him either to take her back into the home or to provide for her support, but he refused to do either. In some fashion she managed to survive and support herself, and finally was married to the defendant, John H. Long, with whom she is still living at their home in Bellingham, Washington. On a visit to California with her husband, she visited her father at his farm, arriving there on his ninetieth birthday, and was cordially received during a visit of a few days. In 1913, proceedings were begun in the County Court of Linn County for the appointment of a guardian for Samuel G. Collins, upon the ground that he was suffering from senile dementia and was in danger of wasting his property, and John R. Collins was appointed such guardian. Thereafter, Mrs. Long made another visit to her father, finding him at the home of the guardian, at Independence, in Polk County. During this visit, the old man filed a petition in the County Court of Linn County to be relieved from the control of a guardian, insisting that he was fully competent to look after himself and his property. After a hearing, his petition was denied. Immediately thereafter, he undertook to convey to his daughter, Mrs. Long, the north half of his farm, and the deed so executed was duly recorded by her, and, with the consent of the guardian and the County Court, she took her father with her to her home in Bellingham. The guardian commenced a suit in the Circuit Court of Linn County to set aside the conveyance to Mrs. Long, and a decree was made and entered in accordance with the prayer of the complaint. Mrs. Long and her father returned from Bellingham to con-

test this suit, and after its conclusion again went to the home in Bellingham, where the old man remained until his death, which occurred on December 9, 1916. On June 9, 1916, the old man employed John R. Crites, an attorney practicing law in Bellingham, to write his last will and testament, which was done, and this instrument, properly executed and witnessed, is the one now contested. By its terms, the north half of the farm in Linn County is devised to the daughter, Ada L. Long, and in the south half is granted a life estate to the testator's widow, with remainder over to the other sons and daughters and the children of the deceased daughter, in equal shares.

1. The evidence by which the plaintiffs seek to establish the testator's incompetency, consists, in the first place, of the decree of the County Court, adjudging the testator to be an incompetent person and appointing a guardian of his person and estate. Counsel for plaintiffs urges that such decree, not having been appealed from, is *res adjudicata*, and conclusive. This contention is fully answered by the opinion *In re Sturtevant's Estate*, 92 Or. 269 (178 Pac. 192, 180 Pac. 595), in which it is held that—

“A person under guardianship does not on that account lose his right to make testamentary disposition of his estate, if he retains sufficient mental capacity to execute a will.”

In the case of *Ames' Will*, 40 Or. 495 (67 Pac. 737), this court speaking by Mr. Justice Moore, said:

“The rule is settled in this state that if a testator at the time he executes his will understands the business in which he is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity, notwithstanding his old age, sickness, debility of body, or extreme distress.”

There is evidence tending to show that before the old man was taken to Bellingham he was very forgetful, would put money away and be unable to recall where he had placed it, would fail to recognize old acquaintances, or familiar places, and that he on one occasion was heard tapping the wall of his sleeping apartment with his cane, and when asked why he did so, explained that he was driving out the ghosts. Our attention is also called to the fact that on another occasion when his daughter entered the kitchen with an apron full of chips, he referred to the chips as a lapful of "nigger babies," and laughed. And on another occasion, when the heavy rains had raised the water in a slough which passed through other farms before it reached his, he complained that neighbors were turning in water to drown out his farm. All of these fragments of evidence occurred more than two years before the old man executed the will in question. Upon the other hand, Mr. Crites, the lawyer who prepared the will, says that he received all of the data and information from the old man himself, who had no written memorandum with him when he described the property and named the members of his family, and that the testator appeared to him to be exceptionally bright and clear mentally at the time. The same witness testifies further as follows:

"Well, he told me that he had two sets of children and said that this farm in Oregon, which amounted to about two hundred acres, was purchased or procured with money that came from land that was owned by the mother of Mrs. Long and John Collins,—his son John—I think it was back in Iowa, and that when he married his present wife they practically kicked Mrs. Long out to hustle for herself, and she had been making her own living for years, ever since, and he felt as though he had never done anything for her and had done her a

great wrong and he felt as though he would like to make that wrong right in making this will. That came up when I suggested to him why he did not make John and Mrs. Long equal in his bounty, and he said that he believed that he could right it, and while he wanted his wife to have a living during her lifetime, he felt that the other children had been practically raised out of the proceeds of this farm, and Mrs. Long never had any benefit from it. So he thought by giving her the north one half of the land and allowing his wife to have the other one half during her lifetime and giving the other one half that his wife had during her lifetime, to all of the children—and especially as John had always enjoyed the use of this farm he ought to be classed with the other children—he could make things right.”

W. A. McCutcheon, one of the subscribing witnesses to the will, says:

“At the time he talked very intelligently and seemed to have quite a business head on him, and was very firm in any remarks he made and wanted everything done exactly the way he wanted it. I do not believe you could change the old man’s mind at all. He seemed to be perfectly competent to make a will and seemed not to forget it, and seemed to know what he was talking about.”

Mr. Fred P. Offerman, the other subscribing witness, says:

“I think he was competent, as far as I know. He acted that way. He was rather an old man but I supposed he was competent.”

2. Doctor Goodheart, a physician at Bellingham, who had attended the old man professionally on several occasions, the last being the day on which the will was executed, testified that he regarded him as an exceptionally capable man for his age, and quite competent. We think that under the law as declared by this court in the cases cited, the testator was fully competent.

3. The remaining topic for consideration is that of the exercise of undue influence. In support of this, plaintiffs call our attention to the deeds executed in favor of Mrs. Long while the decedent was under the control of a guardian, her taking him to her home in Bellingham and keeping him out of touch with his family, her active defense of the suit to set aside the last deed made to her by the old man, and the alleged statement made by her, that she intended to get the property mentioned in the will or spend a considerable sum of money in the effort. It is further urged that although she and her husband both testify that they never at any time discussed with the old man the contents of his will, they are not to be believed because she is a vicious and dishonest woman. It is true that the petition contains this allegation:

“That the said Ada L. Long is a scheming, unprincipled woman without sense of honor, and for years was what is commonly called and termed ‘An Adventuress,’ and it was a part of her scheme and purpose in getting him to go with her to the State of Washington, and getting permission to take him to the said state and out of the State of Oregon, was to get his property.”

No evidence was offered in support of these allegations and they simply add to the weight of wrong heaped upon this defendant by the occupants of the house to which she had a right to look for guidance and protection. The statement of the testator to his attorney, that he was making this bequest in an effort to atone for the hideous cruelty of driving an unformed country girl, not more than 17 years old, out into a hostile world to fend for herself, is much more impressive. Practically every legal question presented in this case, has been fully discussed and settled *In re*

Sturtevant's Estate, 92 Or. 269 (178 Pac. 192, 180 Pac. 595), and it is therefore needless to enlarge upon them here. We conclude that the petitioners have not established the charge of undue influence, and the decree of the Circuit Court is affirmed.

AFFIRMED.

BEAN, BURNETT, and HARRIS, JJ., concur.

Argued December 16, 1919, reversed January 27, 1920.

MULKEY v. BENNETT, SUPERINTENDENT OF BANKS.

(186 Pac. 1115.)

Mandamus—Pleading Conditions Precedent Necessary to Compel Issue of Charter to do Banking Business.

1. In the absence of allegation by petitioner that the superintendent of banks has examined into the condition of a proposed bank and has ascertained the character and general fitness of the persons named as officers and stockholders, or has refused to do so, *mandamus* will not lie to compel him to grant a charter, in view of Section 4568, L. O. L., as amended by Laws of 1917, page 154, Section 2.

Mandamus—Demurrer not Admission of Facts not Alleged.

2. While a demurrer admits all of the allegations of an alternative writ of *mandamus*, it cannot be deemed or treated as an admission of any fact which is not alleged.

Banks and Banking—Constitutional Law—Statute Requiring Permission to Establish Bank not Denial of Equal Protection.

3. Section 4568, L. O. L., as amended by Laws of 1917, page 154, Section 2, relating to the issuance of charters to banks and the powers of the superintendent of banks, is not a denial of equal protection within 14th Amendment to U. S. Constitution.

Constitutional Law—Complaint as to Constitutionality of Statute not Considered in Absence of Injury.

4. It cannot be contended that the portion of Section 4568, L. O. L., as amended by Laws of 1917, page 154, Section 2, which reads, "and if in his opinion the organization of such bank is justified," confers upon the superintendent of banks an arbitrary power and that the same is unconstitutional, unless the person complaining has strictly complied with the provisions of such section.

From Marion: GEORGE G. BINGHAM, Judge.

Department 2.

This is a proceeding in *mandamus* to compel the defendants to issue to the plaintiffs a charter to do a banking business in the district of St. Johns, in the City of Portland.

The defendant, Mr. Olcott, is Governor and Secretary of State, and Mr. Hoff is State Treasurer; and together they constitute the state board of bank commissioners which elected the defendant, Bennett, as state superintendent of banks. It is alleged that the City of Portland has a population of 200,000; that the St. Johns district, formerly the City of St. Johns, which is now in the City of Portland, is situated more than two miles, to wit, twelve miles, from the central portion of Portland.

About March 27, 1919, the plaintiffs, acting through L. A. Bass, made a written application to defendant W. H. Bennett, as state superintendent of banks, for a priority right to organize a bank in the St. Johns district, in the City of Portland, by whom they were informed that it would be necessary to show a desire and need upon the part of residents in that section before he would grant a charter. It is then alleged:

“That the petitioners above named are citizens of the United States and residents and inhabitants of the State of Oregon, and that all save two of your petitioners are actual residents within the St. Johns district, in the City of Portland; that on or about the sixteenth day of April, 1919, petitioners associated themselves together by articles of incorporation for the purpose of establishing a state bank to do a general banking business within the City of Portland, Multnomah County, Oregon; said bank to be situated in the St. Johns district of said city upon the terms and conditions set out in said articles of incorporation, a copy of which, marked exhibit ‘A,’ is attached hereto, re-

ferred to and made a part hereof; that thereupon petitioners elected S. A. Mulkey, J. W. Davis and L. A. Bass, majority stockholders in said corporation, as directors thereof and thereupon subscribed in full for the full amount of the capital stock of 500 shares of the par value of \$100 per share and further subscribed the sum of \$5,000 for organization expenses of said corporation, a copy of said subscription list, marked petitioners' exhibit 'B,' being hereby attached, referred to and made a part hereof.

"That thereafter and on said date, petitioners filed with the defendant, Will H. Bennett, superintendent of banks, triplicates of the said articles of incorporation, a list of stockholders, showing names, addresses and number of shares subscribed by each and made written application to said defendant for a charter as a state bank to do a general banking business in St. Johns district of the City of Portland, Multnomah County, Oregon, and at the same time tendered to defendant \$31 as organization and corporation fees therefor."

On April 23, 1919, the defendant Bennett, as such superintendent, refused to grant a permit and made the following indorsement on the articles of incorporation:

" * * * for the reason that in my opinion the organization of such a bank in St. Johns is not justified at the present time. (Sec. 20.) There is already a national bank at this point which is the amalgamation of two national banks formerly located there, and also a state bank which expects to move from the outskirts of St. Johns into the heart of the district. The state bank, as you know, has been in the hands of this department temporarily, but has been completely reorganized and permitted to reopen."

The petitioners appealed from that decision and refusal, to the state banking board which held a hearing thereon, April 29, 1919, and on May 2, 1919, it sus-

tained the decision of Bennett, as superintendent of banks, in his refusal to grant the permit, but in its decision provided:

"That if the First Trust & Savings Bank of St. Johns hereinafter referred to had not moved into the business district of St. Johns, by July 1, 1919, an application for a charter would be considered."

The First Trust & Savings Bank was a banking corporation, formerly doing business in the St. Johns district, and it became insolvent on February 19, 1919, and for such reason was taken under control by the state superintendent of banks. The assets thereof were assigned to one Dornbecher who paid all the claims against it in full.

It is alleged that, between the date of petitioners' application for permission to organize and the date of the hearing on appeal to the state banking board, the defendant Bennett, as superintendent of banks, disregarding the rights of petitioners and the priority of their application, attempted to revive the First Trust & Savings Bank of St. Johns by means of supplementary articles of incorporation, into a new association of persons with a capital stock of \$50,000, to be then removed to the business section of the St. Johns district and resume business under the corporate name of "Bank of Commerce," which was the identical name chosen by petitioners, as set forth in their application to defendant Bennett and in their articles of incorporation.

It further appears that at the hearing on the appeal, Bennett represented that the reorganized First Trust & Savings Bank and the Peninsula National Bank of St. Johns would be sufficient to care for the banking business of that district, and that the organization of

a new bank therein would be detrimental to the interests of those two banks.

It is then alleged that the act of Bennett, in his attempt to revive the First Trust & Savings Bank of St. Johns is illegal, null and of no effect, and that permission to use the old charter of that bank is in effect to establish a new bank in subversion of the priority and rights of the petitioners; that the total capital stock of the three banks would be \$150,000, and that the bank deposits within the St. Johns district aggregate \$1,500,000, and that the actual ratio of deposits therein is ten to one and the ratio of deposits to required capital stock that of fifteen to one. Petitioners allege that the refusal of the defendants to grant them a charter "is an abuse of discretion, partial, arbitrary, discriminatory and unjust." Plaintiffs tendered the statutory fees.

To the alternative writ the defendants filed a demurrer, upon the grounds:

First, "That the court has no jurisdiction over the subject of the action."

Second, "That said writ fails to state facts sufficient to constitute a cause of action against said defendants, or any of them."

The demurrer was overruled and judgment was entered in favor of the plaintiffs, as prayed for in their petition; and the peremptory writ was issued, from which the defendants appeal, claiming that the court erred in not sustaining the demurrer which is the only question presented.

REVERSED.

For appellants there was a brief over the names of *Mr. I. H. Van Winkle*, Assistant Attorney General, and *Mr. George M. Brown*, Attorney General, with an oral argument by *Mr. Van Winkle*.

For respondents there was a brief with oral arguments by *Mr. George Estes* and *Mr. E. M. Morton*.

JOHNS, J.—1. Section 4568, L. O. L., as amended by the General Laws of 1917, page 154, among other things provides:

“The superintendent of banks shall examine into the condition of such bank and shall ascertain from the best sources of information at his command whether the character and general fitness of the persons named as stockholders and officers are such as to command the confidence of the community in which such bank is proposed to be located. If, upon such examination, it appears that said bank is lawfully entitled to commence business and the directors and officers are competent to engage in the business of banking, and if, in his opinion, the organization of such bank is justified, he shall forthwith issue to such bank, under his hand and official seal, a charter to do banking business.”

There is no allegation in the alternative writ that the superintendent of banks ever examined into the condition of the proposed bank, or that he ever ascertained from any source of information the character or general fitness of the stockholders or officers of the proposed bank, or whether either of them had the confidence of the community where it was to be located, or that their character or general fitness would entitle them to a charter. Neither is there any allegation that the plaintiffs ever requested him to make such examination and investigation, or that he ever refused to do so. Neither is there any allegation that the stockholders and officers are competent to engage in the business of banking or that the superintendent of banks was ever requested or refused to make any such finding. All of such matters are conditions precedent to the granting of a bank charter, which it was necessary for the peti-

tioners to show and allege. The rule is well stated in 26 Cyc. 435:

"To entitle petitioner to relief the petition or the alternative writ must allege the existence of all such facts as are essential elements of the right and duty sought to be enforced, and show that all things have been done which are required to be done in order to give rise to the right and duty. Accordingly if prerequisites or conditions precedent to the duty to act or to the right to demand action are imposed by statute or otherwise, it must appear that they have been fully complied with and performed, so that the court can determine that a present duty rests on respondent and that a present right to performance is vested in petitioner. And some courts have gone so far as to hold that petitioner should by his allegations anticipate objections to the issuance of the writ and negative their validity." Citing *People v. Glann*, 70 Ill. 232, in which it is said:

"Where a right claimed is dependent on the performance of conditions precedent, it is not sufficient to state a performance in all things generally, but the pleader should allege specially that each condition has been performed and the manner of its performance."

In 18 R. C. L., page 342, Section 294, it is said:

"Where the right to have a particular act done at the time and in the manner demanded is dependent on some other act having been done or some condition existing, in order to show affirmatively by the petition for the writ that the relator is entitled, as claimed, facts must be stated therein showing that such preliminary act has been done or condition created."

2. Plaintiffs allege that the charter was refused by the above written indorsement made on the articles of incorporation and that it was refused for the reason that, in the opinion of Mr. Bennett, another bank was not required at St. Johns under the business conditions then existing; and that such refusal was arbi-

trary and wrongful. The plaintiffs are the moving parties and it devolves upon them to allege the performance of and a compliance with every specific act provided by Section 4568, L. O. L., as amended, as conditions precedent to the granting of the writ for the refusal to grant the charter. The reason stated by the superintendent of banks is not a legal admission that the plaintiffs have complied with all or any one of such specific provisions. While the demurrer admits all of the allegations of the alternative writ, it cannot be deemed or treated as an admission of any fact which is not alleged.

3, 4. In both the lower and this court plaintiffs contended that the portion of Section 4568, which reads: "And if in his opinion the organization of such bank is justified," confers upon the superintendent of banks an arbitrary power, denies them equal rights and protection under the law, and is in conflict with Article XIV of the Constitution of the United States. The lower court sustained that contention.

This court must assume that no bank has ever been granted or will receive a charter without a full compliance with the specific provisions of Section 4568, above quoted, as to the conditions of the bank and the character and general fitness of the officers and stockholders and as to whether they are competent to engage in the business of banking. That is not class legislation and until such time as the plaintiffs allege a strict compliance with such provisions of that section of the banking law, no constitutional question is presented and they have no legal right to complain.

The demurrer is sustained, judgment reversed and the writ denied.

REVERSED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued December 19, 1919, affirmed February 3, 1920.

GRIFFIN v. GRIFFIN.

(187 Pac. 598.)

Divorce—Decree for Custody of Children Final While Conditions Remain Same.

1. A decree fixing the custody of a child is final when conditions existing at the time of its rendition remain the same, and should be modified only when conditions have changed, and then only for the child's best interests.

Divorce—Decree Awarding Custody of Children Given Effect in Another State Until Conditions Change.

2. In the absence of fraud or want of jurisdiction affecting its validity, a divorce judgment awarding the custody of their minor children should be given full force and effect in other states as to the right of custody at the time and under the circumstances of the decree's rendition, although it has no controlling effect in another state as to facts and conditions arising subsequently, and the courts of such other states may, upon change of facts and conditions, award the custody otherwise than in the original decree.

Divorce—Decree Awarding Custody of Children Res Adjudicata in Another State Only as to Facts and Conditions Before Decree.

3. A divorce decree of one state awarding custody of minor children is not *res adjudicata* in the courts of another state, except as to facts and conditions before rendition of the decree, and as to subsequent facts and conditions it has no extraterritorial force.

Divorce—Decree Ordering Custody of Children not Binding Under Full Faith and Credit Clause in Other State in Which They have Become Domiciled.

4. A divorce decree of one state ordering the custody of a child is not binding upon the courts of another under the full faith and credit clause of the federal Constitution after the child has become domiciled in the latter state.

Divorce—Decrees for Custody of Children Should be Modified Only upon Proper Notice to Adverse Party.

5. As a general rule, an application for a modification of a divorce decree as to custody of the children should be made to the court upon proper notice to the adverse party.

Divorce—Right of Divorced Parent Having Custody of Children to Change Domicile upon Complying With Decree.

6. A California divorce decree awarding custody of minor children to the mother, permitting the father to visit them at stated times, and providing that the children should not be removed from the jurisdiction without the court's permission, does not prevent the mother taking them from the state by the court's permission from changing her domicile to another state, where the divorce was abso-

lute, since, the minor children being in the mother's custody, her residence is their residence.

Divorce—Decree Awarding Custody of Children of Divorced Parents Void for Defective Service.

7. A notice attempted to be served in Oregon upon a divorced wife, a *bona fide* resident of Oregon, for modification of a California interlocutory divorce decree as to custody of minor children, was without extraterritorial force, and not being served upon the mother's attorney, and she not appearing at the hearing, and the ten days after service required by the citation for appearing not being in accordance with the spirit of Code of Civil Procedure of California, Sections 410, 1005, the decree rendered upon such citation awarding the children to the father was not valid.

Evidence—No Judicial Notice of Official Character of Sheriff of Other State.

8. A court of one state cannot take judicial notice of the official character of a sheriff of a county in another state.

Divorce—Effect of Final Decree on Modification Changing Custody of Children.

9. Since, in view of Civil Code of California, Sections 131, 132, a California court in making a final decree in a divorce action would not, without a notice and hearing, change the interlocutory decree as regularly modified and reverse the same as to the care and custody of children, and deprive a party of his or her day in court, where a second modification of interlocutory decree as to custody of children was void, it did not affect the final decree, which did not purport to change the status of the parties as established by the interlocutory decree and modifications.

Divorce—Admission of Evidence of Facts Prior to Decree upon Question of Changing the Custody of Children.

10. In a proceeding to modify a divorce decree as to custody of children, the change of circumstances, the conduct of the party, the morals of the parents, their financial condition, the children's age and devotion of either parent to the children's best interests, are controlling, and it was not error to admit testimony of facts and circumstances prior to the rendition of the divorce decree which would aid in determining if the conditions were changed.

Appeal and Error—That Incompetent and Immaterial Evidence has been Disregarded by the Trial Court Sitting Without Jury Presumed.

11. Incompetent and immaterial evidence admitted upon the trial of a cause by the court without a jury is presumed disregarded by the court where there is other competent testimony to support the court's findings.

Habeas Corpus—Husband Seeking Custody of Children Awarded to Wife upon Divorce must Prove Conditions Warranting Change.

12. Where the custody of children was awarded to the wife in a divorce decree in California, and the children became domiciled with the mother in Oregon, in a *habeas corpus* proceeding by the father,

it was incumbent upon him to show that conditions had so changed since the granting of the divorce decree as to warrant a change in custody.

Infants—State may Determine Status of Infant Citizens.

13. The state, as *parens patriae*, has the undoubted right to determine the status or domestic and social condition of infant citizens domiciled within its territory.

From Yamhill: HARRY H. BELT, Judge.

Department 2.

This is a proceeding in *habeas corpus* for the custody of two minor children. The trial court dismissed the writ and awarded the custody of the minor children to the mother, Emma A. Griffin. Bertram S. Griffin, the father, appeals.

The parties were married in the State of California, May 8, 1904. Two children, Vivian Griffin, now about thirteen years of age, and Bernice Griffin, now about eleven years of age, were born of this union. April 15, 1913, Emma A. Griffin commenced a suit for divorce against her husband, the appellant herein, in the Superior Court of the State of California for the county of Del Norte. On August 18, 1913, an interlocutory decree of divorce was entered in the cause, and in such interlocutory decree the two children were awarded to the mother, with permission to the father to visit them at certain times. May 20, 1914, both parties being present in court and represented by their respective attorneys, a hearing was had on the application of the appellant herein for a modification of the interlocutory decree of divorce, and on May 29, 1914, a decree was entered in the divorce action modifying the original interlocutory decree, and in the modification it was, among other things, provided:

“That the care, custody and control of said children * * shall remain with the mother, except as otherwise herein provided, * *

"The said children shall not be removed from nor leave the jurisdiction of this court (Del Norte County, Cal.) until their majority, unless upon the written permission of this court; * * *

"The father has the absolute right to have said children or either of them by himself any place he wishes in Del Norte County, California,"

At certain times therein specified, and then certain regulations were provided about notice to the mother.

"If either of the children become sick or ill or injured, the father must be immediately notified,"—and he shall have the right to visit them, unless the attending physician refuses the visits.

"That the final decree of divorce (if ultimately granted in this manner) shall have incorporated within it the above conditions as stated, unless a further modification thereof shall take place before said final decree is made."

June 12, 1914, Mrs. Griffin obtained written permission from the judge of the California court and took the children to McMinnville, Oregon. The written order of the judge reads thus:

"The plaintiff above mentioned is granted permission to remove Vivian Griffin and Bernice Griffin, minor children of the above parties, from the jurisdiction of this court, but to return them to their present place of abode in good time for the opening of the grade school in Crescent City for the 1914 fall term."

November 24, 1914, the judge of the California court made an order requiring the children to be returned to the jurisdiction of the court, and this order was served on the respondent, in the State of Oregon. In January, 1915, the appellant filed a petition in the California court for an order modifying the modification of the original interlocutory decree of divorce so far as it pertained to the custody of the children, and January 30, 1915, service of this petition and a citation

was attempted to be made on the respondent in Yamhill County, Oregon, which service was proven by the certificate of the sheriff of Yamhill County. The citation required Mrs. Griffin to appear and answer the petition within ten days after service thereof. The record does not show that any notice of the proceeding was given to Mrs. Griffin's attorney of record. The citation was served upon her parents in Del Norte County, California. A hearing was had by the court in the absence of respondent, and an order for a second modification of the interlocutory decree was made on February 25, 1915, in which the care, custody and control of the children was ordered given to the father, for the reason that Mrs. Griffin and the children had not returned to the State of California. July 9, 1915, the Superior Court made its final decree in which the last modification was referred to. **AFFIRMED.**

For appellant there was a brief with oral arguments by *Mr. Walter L. Tooze, Jr.*, and *Mr. Oscar Hayter*.

For respondent there was a brief over the names of *Mr. James E. Burdett* and *Mr. Rollin Laird*, with an oral argument by *Mr. Burdett*.

BEAN, J.—In November, 1916, this appellant commenced this proceeding for the custody of the children, which he claims was awarded to him by the final decree in the divorce case in California. The proceedings in the divorce action in California were pleaded and properly authenticated and brought into the record; also several sections of the statute of California are produced and contained in the record, a portion of which we will hereafter notice.

1. The first and one of the important questions in the case is as to the effect of the decree in the divorce

action in the State of California. This embraces the inquiry as to what the legal provisions of that decree are. Decrees awarding the custody of minor children, the issue of a marriage, rendered at the time of a divorce can hardly anticipate the changes which may occur in the condition of the parents, or their habits and character and their fitness and ability to care for the children and provide for their nurture and education. Such changes, and other sufficient reasons, may render it necessary for the good of the children that their custody be changed. Hence most of the statutes on the subject, in the states of the Union, authorize the court to vary or modify its decree in this respect. A decree fixing the custody of a child is, however, final when the conditions existing at the time of its rendition remain the same, and should not be changed except when conditions have become different since the decree, and then only for the best interests of the child: 9 R. C. L., p. 476, § 291; *Merges v. Merges*, 94 Or. 246 (86 Pac. 36); *Rowe v. Rowe*, 76 Or. 491 (149 Pac. 533); *Karren v. Karren*, 25 Utah, 87 (69 Pac. 465, 95 Am. St. Rep. 815, 60 L. R. A. 294); *Hardin v. Hardin*, 168 Ind. 352 (81 N. E. 60); *People ex rel. Allen v. Allen*, 40 Hun, 611; *Id.*, 105 N. Y. 628 (11 N. E. 143); *Wilson v. Elliott*, 96 Tex. 472 (73 S. W. 946, 75 S. W. 368, 97 Am. St. Rep. 928); followed upon appeal in 32 Tex. Civ. App. 483 (75 S. W. 368); *Bennett v. Bennett*, Deady, 299 (Fed. Cas. No. 1318).

2. There is some conflict in the authorities on the question as to the extraterritorial effect of a judgment awarding the custody of children upon a divorce of the parents. A majority of the cases seem to hold, and we think this is in consonance with the better reason, that in the absence of fraud, or want of jurisdiction affecting its validity, a judgment dissolving the bonds of

matrimony between a husband and wife and awarding the custody of the children of the marriage should be given full force and effect in other states, as to the right of the custody of the children at the time and under the circumstances of its rendition; although such a decree has no controlling effect in another state as to facts and conditions arising subsequently to the date of the decree, and the courts of the latter state may, in proper proceedings, award the custody otherwise than pursuant to the original decree, upon proof of matters subsequent to the decree, which justify such change in the award in the interest of the welfare of the children; 9 R. C. L., p. 477, § 293; *Mylius v. Cargill*, 19 N. M. 278 (142 Pac. 918, Ann. Cas. 1916B, 941, L. R. A. 1915B, 154, and note); *In re Alderman*, 157 N. C. 507 (73 S. E. 126, 39 L. R. A. (N. S.) 988, and note, p. 990); *Seeley v. Seeley*, 30 App. D. C. 191 (12 Ann. Cas. 1058); *In re Bort*, 25 Kan. 308 (37 Am. Rep. 255).

3, 4. A judgment or decree of a court of one state awarding the custody of minor children in a divorce case is not *res judicata* in a proceeding in a court of another state, except as to facts and conditions before the court upon the rendition of the former decree. As to facts and conditions arising subsequently to such an award, the decree has no extraterritorial force and the courts of other states are not bound thereby. A decree of a court of one state ordering the custody of a child is not binding upon the courts of another state under the full faith and credit clause of the Federal Constitution after the child has become domiciled in the latter state. Such a decree as to a child has no extraterritorial effect beyond the borders of the state of its rendition. The courts of the second state will not remand the child to the jurisdiction of another state, especially where it is against the true interests of the

child. The reason given for this rule is the fact that the children are the wards of the court and the right of the state rises superior to that of the parents. Therefore, when a child changes his domicile from one state to another and becomes a citizen of the second state, he is no longer subject to the authority and supervision of the courts of the first state: 15 R. C. L., p. 940, § 417.

The same rule appears to be applied where the writ of *habeas corpus* is used, not strictly as a writ of liberty according to the original meaning of the term, but only indirectly and theoretically as such, and as a means of ascertaining and adjudicating the rights of conflicting claimants to the care and custody of a minor child: 12 R. C. L., p. 1255, § 73; *Cormack v. Marshall*, 211 Ill. 519 (71 N. E. 1077, 1 Ann. Cas. 256 and note, 67 L. R. A. 787); *Brooke v. Logan*, 112 Ind. 183 (13 N. E. 669, 2 Am. St. Rep. 177).

5, 6. The Supreme Court of California has construed Section 138 of the Code of Civil Procedure of that state, which provides that in an action for divorce the court may, at any time after the final hearing during the minority of any children, modify or vacate the decree as to the custody of the children: See *Russell v. Russell*, 20 Cal. App. 457 (129 Pac. 467); *Van Horn v. Van Horn*, 5 Cal. App. 719 (91 Pac. 260); *Dickerson v. Dickerson*, 108 Cal. 351 (41 Pac. 475). As a general rule, an application for a modification of the decree as to custody of the children should be made to the court upon proper notice to the adverse party: 14 Cyc. 810b.

Mr. Bishop in his work (2 Marriage, Div. & Sep., § 1189), in speaking of the binding force of a foreign custody decree, says:

"It is believed that this question can be accurately seen only by looking down below the words of cases to the fundamental doctrine. Under our National Constitution, this order is plainly a record to which, *if the court has jurisdiction* (we underscore), the same faith and effect permitted it in the state of its rendition must be given in every other state. And the true rule in the state of its rendition is that it is *res judicata*, concluding the question. But it does not conclude the question for all time, since new facts may create new issues. Nor, since the relation of parent and child is a status, rightfully, like marriage, regulated by any state in which the parties are domiciled, does the order in one state operate as an estoppel of all future inquiry in the courts of another state wherein the child has acquired a domicile. * * If the divorce was *ex parte*, against a father who with his child, was domiciled in another state, the decree for custody would be without jurisdiction, and therefore void."

In 2 Nelson, Div. & Sep., Section 980, it reads thus:

"It is clear that a decree based upon constructive service is void for lack of jurisdiction so far as it attempts to fix the custody of a child residing with the defendant in another state. It is not *res adjudicata* as to the defendant or as to the interest of the state in which the child resides."

The petitioner contends that the provisions of the California decree, awarding the custody of the children to the mother and permitting the defendant to visit the children at stated times and providing that the children shall not be removed from the jurisdiction of that court without permission of the court, precluded Mrs. Griffin from changing her residence to another state. This is a delicate and important problem. The solutions by the courts have not always been uniform, it would seem, on account of the variant circumstances of the cases. It is one of the regretful incidents of the severance of the marriage relations and the

breaking up of the home of the children. The dissolution of the bonds of matrimony, heretofore existing between the petitioner and respondent, was complete. We know of no law that would prevent the mother from changing her domicile to another state, and upon compliance with the decree, taking the children with her. The children being in the care and custody of the mother, her residence is their residence. Such is the natural effect of a decree of divorce. It is true that such change of residence may render it inconvenient for the father to visit the children. It is extremely difficult to divorce the parents and at the same time keep them together. "Ye cannot serve God and mammon." The Supreme Court of Maine has grappled with this difficult question. In *Stetson v. Stetson*, 80 Me. 483 (15 Atl. 60), a divorce was granted in 1883, and the custody of the minor child was awarded to the father. About 1888, the mother, who was then a resident of Boston, Massachusetts, petitioned the Maine court for a modification of the decree so that she might take general custody of the minor child, the father to have the privilege of visiting it and the possession of the boy for two weeks during summer vacation. On account of her residence it was urged that the court could not permit the child to be removed beyond its jurisdiction. The court, speaking by Mr. Justice DANFORTH, said at page 485 of 80 Me. (at page 61 of 15 Atl.):

"That the result of the decree may cause the removal of the child beyond the limits of the state is not of itself an objection. This may be the effect in any case. Though the parent receiving the custody may at the time be a resident within the state, there is no authority, except in cases of crime, to prevent an immediate removal from the state."

It is clear that the statute of California presupposes that the court in making a modification of a decree in a divorce action, which awards the custody of minor children to one of the parties, would have jurisdiction of the parties; that is, that an application for such change would be made and reasonable notice thereof served upon the adverse party otherwise, unless the party appears, jurisdiction to make any change in the award would be lacking and the decree would be a nullity. We find nothing in the opinions of the court of last resort in California to the contrary: See *Phillips v. Phillips*, 24 W. Va. 591.

7. At the time of the attempted service of the notice of petition for the second modification of the California decree, Mrs. Griffin was a *bona fide* resident of the State of Oregon. The citation issued by the California court had no extraterritorial force. It was not served upon her attorney. She did not appear at the hearing. The time for her appearance, ten days after service, required by the citation, was not in accordance with the spirit of the statute of California, where the person served is at so great a distance from the place of holding the court.

Section 410 of the California Code of Civil Procedure provides that:

“The summons may be served by the sheriff of the county where the defendant is found, or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served, with the summons, upon each of the defendants. When the summons is served by the sheriff, it must be returned, with his certificate of its service, and of the service of any copy of the complaint, where such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of

its service, and of the service of a copy of the complaint, where such copy is served."

Section 1005 reads:

"When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of each party has his office, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time."

8. A court of one state cannot take judicial notice as to the official character of a sheriff of a county in another state.

9. It is not seriously claimed on behalf of petitioner that the California court had jurisdiction to make the second modification, but counsel for appellant urge that the final decree referred to the order of modification and therefore it was made a part of the final decree. We quote the requirements of the code of California.

"Section 131. Interlocutory judgment. In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and from such interlocutory judgment an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final. After the entry of the interlocutory judgment, neither party shall have the right to discuss the action

without the consent of the other. (Stats. and Amdts. 1909, p. 941, California.)

"Section 132. Final judgment, after one year. When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting (1) the divorce, and such final judgment shall (2) restore them to the status of single persons, and (3) permit either to marry after the entry thereof; and (4) such other and further relief as may be necessary to complete disposition of the action; but,

"If any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed.

"The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense to any criminal prosecution made against either."

It is plain that under the direction of the statute of California, the court in making the final decree in a divorce action, would not, without a notice and hearing, change the interlocutory decree as regularly modified and reverse the same as to the care and custody of the minor children. Such a change would not be in harmony with the general rule that a party is entitled to his or her day in court. The provision of the California statute that the final decree may be made after the death of one of the parties clearly indicates that no change therein without notice is contemplated by the law. It is not a question of regularity or irregularity that we notice but one of power or jurisdiction.

It is stated in 14 Cyc. 804, as follows:

"If defendant and the minor children are not within the jurisdiction of the court and a divorce is granted upon substituted service of process, the court cannot assume jurisdiction over the person of the children and award their custody to plaintiff; but once having acquired jurisdiction of the person of defendant, the court retains it for the purpose of decreeing the custody of the children, although they may be removed from its territorial jurisdiction prior to the granting of the decree."

See, also, *Baily v. Schrader*, 34 Ind. 260, and *State v. Rhoades*, 29 Wash. 61 (69 Pac. 389).

We conclude that the California court was without jurisdiction to make the order of modification of the decree of divorce; therefore the effect of the California decree, as made final, was to grant the care and custody of the two girls to the mother. The final decree does not purport to change the interlocutory decree, or to award the custody of the children otherwise than provided in the modifications. If the second modification is void, then it does not affect the final decree. See *De Vall v. De Vall*, 57 Or. 128 (109 Pac. 755, 110 Pac. 705), the syllabus of which reads:

"Neither the full faith and credit clause of the Federal Constitution (Section 1, Article IV, Constitution) nor Rev. Stats., § 905 (U. S. Comp. St. 1901, p. 677, U. S. Comp. Stats. 1916, § 1519, 3 Fed. Stats. Ann. (2 ed.) p. 212), passed in conformity therewith, prevents an inquiry into the jurisdiction of the court of a sister state by which a judgment rendered therein is offered in evidence and a copy of the record, though duly authenticated, may be contradicted as to the facts necessary to give jurisdiction, or where it appears in a collateral proceeding in another state that such facts did not exist, the record is a nullity, though it may contain recitals that the facts did exist."

10, 11. It is strenuously urged by the counsel for appellant that the trial court erred in admitting and con-

sidering testimony of facts and circumstances occurring prior to the rendition of the decree of divorce. In view of the fact that the welfare of the children is the paramount question for the consideration of the court, and also taking as a guide the rule prevailing in California in such proceedings in arriving at a determination of what is best for the children, the court proceeds upon new facts occurring since the rendition of the decree, considered in connection with facts formerly established upon hearing in the divorce case. This would include the change of circumstances, the conduct of the parties, the morals of the parents, their financial conditions, the age of the children, and the devotion of either parent to the best interest of the children as the controlling force in directing their custody: *Crater v. Crater*, 135 Cal. 633 (67 Pac. 1049); *Simmons v. Simmons*, 22 Cal. App. 448 (134 Pac. 791). However incompetent or immaterial evidence admitted upon the trial of a cause by the court without a jury is presumed to be disregarded by the court where there is other competent testimony supporting the findings of the court. The rule is different from that in a case tried before a jury.

12. The Circuit Court found:

“That the defendant, Emma A. Griffin, is a fit and proper person to have the care, nurture and education, custody and control of the said children, and each of them; that she is of good moral character, and competent to care for and educate said children, and each of them.

“That each of said children are now regular attendants at the public schools of the City of McMinnville, Oregon, and that each of them is properly clothed, nurtured with good wholesome food and live in the same house with the defendant, and are kept under the defendant's care and custody.

“That the best interests and welfare of said minor children demand that they remain in the custody of their mother.”

We concur in the findings of the learned trial judge. They are supported by the evidence and are fully in accord with the California decree as we interpret it; therefore the conclusion reached is based upon two solid foundations. It was incumbent upon the petitioner, to show that since the rendition of the California decree, conditions had so changed as to warrant a change in the custody of the children. This he did not attempt to do, but relied upon the California decree to support his claim.

The best interest of these little girls does not demand that they should be deprived of the loving care of an affectionate mother during the time they are advancing to womanhood. The father proposes an experiment merely, of having them cared for by their grandmother or aunt, one of whom is expected to go from Oregon to California for that purpose. Such an arrangement might last for a year, or more, or less. It would no doubt have been better for the mother to have applied to the California court for a modification of the order granted at the time she left the State of California, when she found that conditions were not favorable for her to return there. The object sought by the order in regard to the children attending school appears to have been attained in another location.

13. A state, as *parens patriae*, has the undoubted right to determine the status or domestic and social condition of infant citizens domiciled within its territory: Brown on Jurisdiction, §§ 78, 79; *Hood v. State*, 56 Ind. 263 (26 Am. Rep. 21).

We endeavor to consider the question in this proceeding in the same manner it would have been by the

courts of California had it been instituted in a different county of that state from the one in which the divorce was granted.

In *Beyerle v. Beyerle*, 155 Cal. 266 (100 Pac. 702), where a claim was made by the defendant, the father, for the care and custody of a minor child after an interlocutory decree giving the custody of the child to the mother who was plaintiff in the divorce action, had been merged in a final decree, we find the rule expressed by the highest court of that state in the following language of Mr. Justice ANGELLOTTI:

"It is furthermore settled beyond dispute and expressly conceded by counsel for plaintiff that the paramount consideration where the question of the custody, etc., of a child of the marriage is presented, is the welfare of the child."

We affirm the judgment of the lower court.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued December 2, 1919, reversed and remanded February 3, 1920.

LEVINE v. LEVINE.*

(187 Pac. 609.)

Judgment—Full Faith and Credit Clause Applies Only to Final Adjudication in One State Sued on in Another.

1. Article IV, Section 1, of U. S. Constitution, requires that full faith and credit shall be given in each state to the judicial proceedings of every other state; but in order to maintain an action on a money judgment recovered in another state the judgment must be a final adjudication in full force in the state where rendered, capable of being there enforced by final process.

*Authorities passing on the question of action to recover installments of alimony accruing under a decree rendered in another state are collated in notes in 59 L. R. A. 178; 9 L. R. A. (N. S.) 1168; 28 L. R. A. (N. S.) 1068.

Divorce—Final Judgment for Alimony in One State Entitles Plaintiff to Sue for Enforcement of "Debt" Therefor in Other State.

2. Where a suit terminates in a divorce decree, providing for the custody and maintenance of a minor child and for alimony to the wife, that part of the decree relating to divorce is protected by Article IV, Section 1, of U. S. Constitution, relating to full faith and credit, as are also the provisions as to maintenance and alimony, if they are finalities, an alimony decree being generally considered a "debt" of record as much as any other judgment for money; and in another state, where the distinction between actions at law and suits in equity are preserved, plaintiff may resort to an action at law to enforce the debt created by the decree.

[As to enforcement of decree for alimony by action at law, see notes in 3 Ann. Cas. 579; 8 Ann. Cas. 700; 10 Ann. Cas. 547; 20 Ann. Cas. 1068.]

Divorce—Plaintiff, to Whom Alimony Payable, Proper Party to Sue Therefor in Another State.

3. Where a divorce decree of one state required defendant to pay installments for alimony for maintenance "to the plaintiff," she is the proper party to bring action in another state to recover for unpaid installments.

Divorce—Courts of One State not Required to Enforce Alimony or Maintenance Decree of Other, if Subject to Modification by Rendering Court.

4. If a part of a divorce decree of another state relating to alimony or maintenance is not final, but is subject to modification by the court rendering it, then neither Article IV, Section 1, of U. S. Constitution, relating to full faith and credit, nor comity, compels the courts of another state to enforce that part of the decree, since no other than the court rendering the decree could undertake to administer relief without bringing about conflict of authority.

Divorce—Where Court has Power to Modify Accrued Installment of Alimony or Maintenance, Decree is not Final, Within Full Faith and Credit Clause.

5. Whether an accrued installment of alimony is to be treated as a final judgment, entitled to protection of Article IV, Section 1, of U. S. Constitution, relating to full faith and credit, must be determined by the law of the state in which the decree is entered, and if the law of such state gives discretionary power to modify an accrued installment, then such installment does not come within such constitutional provision.

Divorce—Decree for Maintenance and Alimony Subject to Modification as to Accrued Installments not Entitled to Full Faith and Credit in Other State.

6. In view of Gen. Stats. Minn. 1913, Sections 7123, 7129, having been construed by the Minnesota Supreme Court as giving the decreeing court discretionary power to modify the divorce decree as to alimony and maintenance and revoke or change the amount of matured installments, because of change of conditions since original adjudication, which is not *res judicata* as to subsequent conditions, the decree is not final as to maintenance and alimony, and not within

the protection of Article IV, Section 1, of U. S. Constitution, relating to full faith and credit as to such matured installments.

Divorce—Requirement That Plaintiff Allege and Prove Alimony in Maintenance Decree a Finality to Recover Thereon in Another State.

7. Plaintiff, bringing law action to collect past-due installments on divorce decree for alimony and maintenance, is not entitled to the full faith and credit of the decree, under Article IV, Section 1, of U. S. Constitution, unless she alleges and proves the decree's finality as to alimony and maintenance installments past due; but such installments are entitled to full faith and credit where, after they have become due, they are decreed or adjudged by the original court to be presently payable.

Divorce—Decree for First Installment of Alimony Held Sufficiently Final in Sister State to Entitle to Judgment.

8. A decree for present payment of a fixed sum as alimony or maintenance, even though not absolutely final under the law of the state where rendered, is nevertheless, when unpaid, at least *prima facie* final in a sister state, and, in the absence of evidence to the contrary, is sufficient to support a judgment in the sister state, so that plaintiff is entitled to a judgment for the first installment of alimony, due at time of rendition of original decree.

Divorce—Alimony Decree for Money Presently Due Treated in Sister State as Final Decree Until Modified.

9. In an action for judgment for past installments of alimony and maintenance, if the original decree had been modified as to amounts due at date of original decree, such modification would be enforced, or, if defendant asked time of the state in which enforcement is sought, he would be allowed to proceed in the court of original instance to modify the decree; but, until the decree is modified in the state of its origin, it is to be treated as a final judgment.

Divorce—Alimony and Maintenance Installments not Enforceable in Sister State Until Adjudicated into Fixed Sum Payable Presently.

10. In an action for past-due installments of alimony and maintenance upon a decree in a sister state, from an averment that on a certain date "and for more than two years prior thereto plaintiff and defendant were husband and wife," and the subsequent averment that the suit terminated in a divorce decree, awarding alimony in installments, "the first payment to be October 20, 1913," the inference may be drawn that the first installment was payable on the date of rendition of the decree and may be enforced; but subsequent installments may not be enforced until adjudication in state of original decree transforms them into a fixed sum payable presently.

Costs—May be Refused on Reversal in Law Action.

11. In an action at law, though the appeal has resulted in reversal of judgment for plaintiff, the defendant need not be allowed a judgment for costs and disbursements.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

The plaintiff Hildegard Levine obtained a decree on October 20, 1913, in Hennepin County, Minnesota, divorcing her from her then husband, David Levine. The decree also provided that the plaintiff should have the care and custody of a minor child of the parties. The decree required the father to pay to the mother, for the care and maintenance of the child, the sum of \$25 per month payable as follows: \$12.50 on the fifth day and \$12.50 on the twentieth day of the month "the first payment to be October 20, 1913." The father did not pay any of the installments; and consequently in 1918 the plaintiff began this action in a Circuit Court of this state to recover from the defendant the sum of \$1,300, the amount of the accrued installments. The complaint refers to certain statutes in force in Minnesota and affirmatively avers that the law reserves to the courts of that state power to modify divorce decrees so far as they relate to the care, custody and maintenance of the children of divorced parents. It is alleged that "no part of said decree has ever been changed, modified or vacated, but now remains in full force and effect." The trial court overruled a demurrer to the amended complaint, and, upon the refusal of the defendant to plead further, the plaintiff was awarded a judgment for \$1,300, together with costs and disbursements. The defendant appealed.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. L. E. Schmidt*.

For respondent there was a brief and an oral argument by *Mr. Bartlett Cole*.

HARRIS, J.—1. Article IV, Section 1, of the Federal Constitution, commonly known as the full faith and credit clause, requires that:

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”

Congress exercised the power conferred upon it and by statute prescribed the mode of attesting the records of one state so as to entitle them to be proved in the courts of another state and enacted that records so authenticated should have such faith and credit in every court within the United States as they have by law or usage in the state from which they are taken: 15 R. C. L. 922. This constitutional provision does not confer upon Congress power to give such judgment all the legal properties, rights and attributes to which it is entitled by the laws of the state where rendered. To give it the force of a judgment in another state it must be made a judgment there and can only be executed in the latter as its laws permit: 15 R. C. L. 926; 23 Cyc. 1546. While the judgment of one state is entitled to receive the same faith, credit and respect that is given to it in the state where rendered, it is not entitled to any greater effect or finality than would be accorded to it in the state where rendered; and, therefore, if the judgment is conclusive in the home state it is equally conclusive in the sister state; but if it is inconclusive in the home state, it is likewise inconclusive in the sister state: 15 R. C. L. 928. Expressed in general terms the rule is that in order to maintain an action in one state upon a money judgment recovered in another state, such judgment must be a final adjudication in full force

in the state where rendered and capable of being enforced by final process; and ordinarily it should create a definite and absolute indebtedness against the judgment debtor: 23 Cyc. 1559.

2. When a suit for divorce terminates in a decree which divorces the husband and wife, provides for the care, custody and maintenance of the minor children and allows alimony to the wife, that part of the decree which relates to the divorce is protected by the full faith and credit clause; and so, too, are the provisions concerning maintenance and alimony if they are finalities. An allowance in a divorce decree for the maintenance of children is usually referred to as "maintenance," and an allowance for the divorced wife is generally designated by the term "alimony"; but for the sake of brevity we shall use the term "alimony" as applicable alike to allowances for the maintenance of children and to allowances for the support of the divorced wife. A decree for alimony is generally considered a debt of record as much as any other judgment for money: *Barber v. Barber*, 21 How. 582 (16 L. Ed. 226, see, also, Rose's U. S. Notes); *White v. White*, 233 Mass. 39 (123 N. E. 389); *Phillips v. Kepler*, 47 App. D. C. 384.

If that part of the Minnesota decree which relates to a money award is shielded by the full faith and credit clause, then in this jurisdiction, where the distinction between actions at law and suits in equity are preserved, the plaintiff may resort to an action at law for the enforcement of the debt created by the Minnesota decree: *De Vall v. De Vall*, 57 Or. 128, 145 (109 Pac. 755, 110 Pac. 705).

3. The Minnesota decree requires the defendant to pay the installments "to the plaintiff"; and, hence, she

is the proper party plaintiff: *Phillips v. Kepler*, 47 App. D. C. 384, 388.

4, 5. Precedents involving attempts to enforce in one state decrees for alimony rendered in another state may be divided into three classes: (1) Those dealing with awards payable presently; and this class includes not only those cases where a gross sum is made payable contemporaneously with the rendition of the divorce decree, but also those where installments have accrued on a decree providing for the future payment of alimony in installments and upon the petition of either party there is a finding that the arrears amount to a specified sum and an adjudication that such specified sum is payable presently; (2) those treating of accrued installments which have not been merged into a re-adjudication; and (3) those relating to installments which have not yet become due. Adjudications belonging to the third class may be ignored, since all agree that a decree rendered in one state cannot be enforced in a sister state, as to installments not yet due, for two reasons: (a) No money is yet due; (b) it is generally, if not universally, understood that an allowance is subject to modification before accrual. The Minnesota decree ordered the defendant to pay \$12.50, the first installment, on October 20, 1913, the day of the rendition of the decree, while the remainder was made payable in the future. The complaint alleges that the defendant did not pay "any part of the money awarded to the plaintiff" by the decree; and hence the precedents belonging to the first of the three classes of cases mentioned apply to a small portion, \$12.50, of the moneys sought to be recovered, while the adjudications falling in the second class of cases are applicable to the remainder of the moneys involved in this con-

troversy. We shall first consider the accrued installments.

As already stated the Minnesota decree, to the extent that it is final and not subject to modification, is entitled to the protection of the full faith and credit clause of the Federal Constitution and must be enforced in this state. If, however, a part of the Minnesota decree is not final but is subject to modification by the court which rendered it, then neither the United States Constitution nor the principle of comity compels the courts of this state to enforce that part of the decree, for no court other than the one granting the original decree could undertake to administer relief without bringing about a conflict of authority: 1 B. C. L. 958. Language used in *Lynde v. Lynde*, 181 U. S. 183 (45 L. Ed. 810, 21 Sup. Ct. Rep. 555, see, also, Rose's U. S. Notes), is responsible for a few adjudications which apparently proceed on the mistaken theory that a final judgment can include only moneys payable presently; as, where the decree allows a gross sum payable at once upon the rendition of the decree, or where, as was done in *De Vall v. De Vall*, 57 Or. 128, 132 (109 Pac. 755, 110 Pac. 705), the court which granted the original decree, allowing alimony payable in installments, at some subsequent time, acting upon the petition of either party, finds that specified installments have accrued since the rendition of the original decree and adjudges that, on account of such arrears, a definite sum is payable presently. In other words, there seems to have been an impression, more or less general, that the fact of an original decree allowing alimony payable in the future in installments plus the fact of an accrued installment did not produce such a judgment as was protected by the Federal Constitution; but that before the full faith and credit clause could operate there

must have been an adjudication after the accrual of the installment.

In a subsequent decision, however, the whole subject was clarified and made certain. In *Sistare v. Sistare*, 218 U. S. 1 (54 L. Ed. 905, 30 Sup. Ct. Rep. 682, 20 Ann. Cas. 1061, 28 L. R. A. (N. S.) 1068, see, also, Rose's U. S. Notes), it was held that generally speaking the right to an installment payable in the future becomes vested contemporaneously with the maturity of the installment, provided the decree allowing alimony has not been modified prior to the accrual of the installment, and that therefore such an accrued installment is protected by the full faith and credit clause; but this comprehensive statement made in general terms is subject to an exception, for if under the law of the state where the decree is granted there is reserved to the court which passed the decree discretionary power to modify the original decree so as to affect not only installments yet to become due but also the amount of any installment which has become due and is unpaid, then such accrued installment does not constitute a final judgment, and on that account is not protected by the full faith and credit clause of the Constitution. In other words, the fact that alimony is payable in installments is not necessarily a controlling factor; but the question as to whether an accrued installment of alimony is to be treated as a final judgment entitled to the protection of the full faith and credit clause must be determined by the law of the state in which the decree is entered; and hence if by the law of the state in which the original decree is entered the court is given discretionary power to modify an accrued installment, then that installment does not come within the embrace of the full faith and credit clause of the Federal Constitution: *Rowe v. Rowe*, 76

Or. 491, 495 (149 Pac. 533); *McGregor v. McGregor*, 52 Colo. 292 (122 Pac. 390, 391); *Bolton v. Bolton*, 86 N. J. Law, 622, 625 (92 Atl. 389, Ann. Cas. 1916E, 938); *Campbell v. Campbell*, 28 Okl. 838 (115 Pac. 1111); *Ogg v. Ogg* (Tex. Civ. App.), 165 S. W. 912, 914; *Cotter v. Cotter*, 225 Fed. 471 (139 C. C. A. 453); *Tiedemann v. Tiedemann*, 158 N. Y. Supp. 851, 854 (172 App. Div. 819); *Gaffey v. Criteser* (Tex. Civ. App.), 195 S. W. 1166; *Phillips v. Kepler*, 47 App. D. C. 384, 386; *McCullough v. McCullough*, 203 Mich. 288 (168 N. W. 929, 931); *Collard v. Collard*, 7 Ohio App. 53; *White v. White*, 233 Mass. 39 (123 N. E. 389, 390); *Taylor v. Stowe*, 218 Mass. 248, 249 (105 N. E. 890).

6. In many and probably most of the states statutes have been enacted reserving to the courts power to modify decrees allowing alimony. Upon examination it will be found that in most instances, when conferring the power of modification, these statutes employ general terms, without limiting the power to future installments; as, for example, the New York statute, discussed in *Sistare v. Sistare*, which provides:

"The court may, by order upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions."

In most of the jurisdictions where the question was for the first time presented after and not before the decision of the supreme court of the United States in *Sistare v. Sistare*, 218 U. S. 1 (54 L. Ed. 905, 30 Sup. Ct. Rep. 682, 20 Ann. Cas. 1061, 1067, 28 L. R. A. (N. S.) 1068, see, also, Rose's U. S. Notes), the courts, when interpreting statutes like that of the New York enactment have followed the rule of construction applied in *Sistare v. Sistare* and held that where the statute

granting the power to revoke or modify does not expressly confer authority to annul or change an accrued installment, "every reasonable implication must be resorted to against the existence of such power" to revoke or modify an accrued installment. In other words, in the absence of clear language manifesting an intention to confer the power to revoke or modify the amount of an accrued installment, a statute which in general terms confers the power of modification will, under the more modern authorities, be construed to mean that the power, when exercised, can operate prospectively only and that it cannot operate retrospectively: *Campbell v. Campbell*, 28 Okl. 838 (115 Pac. 1111, 1113); *McGregor v. McGregor*, 52 Colo. 292 (122 Pac. 390, 391); *Bolton v. Bolton*, 86 N. J. Law, 622, 630 (92 Atl. 389, Ann. Cas. 1916E, 938); *Phillips v. Kepler*, 47 App. D. C. 384. Where, however, the statute of any state conferring the power of modification has been construed by the highest court of that state, the construction which such court has placed upon the statute is conclusive upon the courts of sister states when dealing with decrees like the one here involved.

The plaintiff pleaded certain sections of the Minnesota statute and by so doing brought herself within the rule adhered to in *Scott v. Ford*, 52 Or. 288, 294 (97 Pac. 99), and approved in *De Vall v. De Vall*, 57 Or. 128, 138 (109 Pac. 755, 110 Pac. 705). We now turn to the statutes of Minnesota, and, after noticing them, we shall then seek to ascertain what construction that state's highest court has placed upon its legislation.

It is expressly provided by statute in the state of Minnesota that the court, which has passed a decree divorcing the husband and wife and providing for the care, custody and maintenance of their minor children, may at a subsequent date modify the original decree

and, from time to time, on the petition of either parent revise and alter the decree so far as it concerns the care, custody and maintenance of the children and make such new order as the circumstances of the parents and the benefit of the children shall require: Section 7123, Gen. Stats. of Minn. (1913). It is also provided by statute that after rendering the decree of divorce and for alimony "or other allowance for the wife and children, or either of them," the court may, from time to time, on petition of either of the parties, revise and alter the decree "respecting the amount of such alimony or allowance, and the payment thereof, * * and may make any order respecting any of the said matters which it might have made in the original action": Section 7129, Gen. Stats. of Minn. (1913). It will be observed that the language conferring power to modify an allowance for maintenance is in substance and effect the same as the language which grants authority to modify a decree for alimony; and therefore if Section 7129 of the Gen. Stats. of Minn. permits a modification of the decree for alimony to operate retrospectively so as to revoke or change the amounts of matured installments, then the same construction must be placed upon Section 7123 which relates to maintenance.

In the early case of *Semrow v. Semrow*, 23 Minn. 214, 216, it was suggested:

"That it is by no means certain that the provisions (of the statute) as to alteration and revision of alimony apply to a case in which alimony is awarded, * * in a gross sum."

But there are many subsequent precedents in Minnesota holding that the power of modification applies to awards "in a gross sum." We quote from *Haskell v. Haskell*, 116 Minn. 10, 13 (132 N. W. 1129):

“Under the statute of this state the court awarding a judgment for alimony, whether such alimony be payable in a gross amount or in installments, has undoubted authority to revise or modify such judgment. This power may be exercised upon the application of either party for good cause shown. A substantial change from the situation that prompted or made proper the terms of the original decree justifies a change in those terms. An application for such change or modification is addressed largely to the discretion of the trial court.”

In *Holmes v. Holmes*, 90 Minn. 466 (97 N. W. 147), the plaintiff Mina L. Holmes secured a decree on February 13, 1893, which divorced the parties and allowed her alimony in the gross sum of \$600 payable in one year. More than ten years afterwards, on June 27, 1903, the alimony not having been paid, the defendant Frank D. Holmes filed a motion to modify the decree by having that part of it vacated which required the payment of alimony. In the course of the opinion the court refers to the fact that counsel had exhaustively discussed the question of the power to modify the judgment for alimony, “in this case, it being only in gross”; and in response to the argument of counsel the court said:

“It is the law of this state that the court awarding a judgment for alimony, whether it be for a gross amount or payable in installments, has the power to modify such judgment on the application of either party, for good cause shown. * * The power, however, is to be exercised only upon clear proof of new facts showing that the changed circumstances of the parties render proposed modification equitable. The question of such modification is one largely within the discretion of the trial court.”

If we correctly interpret the opinions of the Supreme Court of Minnesota, especially the holding in *Holmes*

v. *Holmes*, it is the law in that state that the court granting a decree for a divorce and alimony has the power subsequently to modify the original decree even as to accrued installments. However, the power of modification is not arbitrary and unrestricted, for as a rule the power to modify is exercisable "only when conditions have changed from what they were at the time the decree was entered, and the change is such as to justify and require a modification"; and it is possible, too, that a decree for alimony may be annulled or modified "upon facts occurring before the decree, of which the party was excusably ignorant at the time of its rendition": *Hoff v. Hoff*, 133 Minn. 86, 88 (157 N. W. 999); *Semrow v. Semrow*, 23 Minn. 214; *Weld v. Weld*, 28 Minn. 33 (8 N. W. 900); *Smith v. Smith*, 77 Minn. 67 (79 N. W. 648); *Barbaras v. Barbaras*, 88 Minn. 105 (92 N. W. 522); *Bowlby v. Bowlby*, 91 Minn. 193 (97 N. W. 669); *Brandt v. Brandt*, 40 Or. 477, 485 (67 Pac. 508). When placing this restriction upon the power of modification the Minnesota court merely followed the general rule which prevails in other jurisdictions; and, indeed, when announcing, in *Semrow v. Semrow*, 23 Minn. 214, this limitation upon the power to modify a judgment for alimony the court relied upon the authority of *Perkins v. Perkins*, 12 Mich. 456; *Blythe v. Blythe*, 25 Iowa, 266; *Fisher v. Fisher*, 32 Iowa, 20; *Wilde v. Wilde*, 36 Iowa, 319. This rule of limitation is based on the theory that the original decree is *res adjudicata* as to the then existing facts; or, as aptly stated in *Blythe v. Blythe*, 25 Iowa, 266, 269:

"The original decree is conclusive upon the parties as to their then circumstances; and the power to make changes in the decree is not a power to grant a new trial or retry the same case, but only to adapt the decree to the new or changed circumstances of the parties."

Further exemplification and discussion of the doctrine may be found in *Graves v. Graves*, 132 Iowa, 199 (109 N. W. 707, 10 Ann. Cas. 1104, 10 L. R. A. (N. S.) 216); *Cole v. Cole*, 142 Ill. 19 (31 N. E. 109, 34 Am. St. Rep. 56, 19 L. R. A. 819); *Perkins v. Perkins*, 12 Mich. 456; *Blythe v. Blythe*, 25 Iowa, 266; *Wilde v. Wilde*, 36 Iowa, 319; *Wagner v. Wagner*, 36 Minn. 239 (13 N. W. 766); *Merges v. Merges*, 94 Or. 246 (186 Pac. 36); *Averbuch v. Averbuch*, 80 Wash. 257 (141 Pac. 701, Ann. Cas. 1916B, 873); 1 R. C. L. 941. In brief, the power of modification can only be exercised when there has been a change in conditions since the original adjudication; for the original decree is *res adjudicata* as to facts and conditions existing at the time of its rendition. Since the power of modification is and always has been thus restricted in all jurisdictions, it is obvious that it was this restricted power of modification which the court had in mind when defining the exception to the general rule spoken of in *Sistare v. Sistare*; and it is manifest that it is there held that, if the court which grants a decree for alimony payable in the future in installments possesses this restricted power of modification, an accrued installment does not upon maturity become entitled to the protection of the full faith and credit clause. The Supreme Court of the United States does not say in *Sistare v. Sistare* that the power of modification must be arbitrary, unlimited or unrestricted in order to prevent the operation of the full faith and credit clause. If we have read and interpreted the decisions of the Supreme Court of Minnesota aright, the court which rendered the decree in the instant case has the power to modify it, if the conditions have changed since its rendition, to the extent of annulling or altering the amount of the installments which have matured since October 20, 1913, the date

of the decree; and therefore the full faith and credit clause does not protect any of those installments and they cannot in their present condition support a judgment in this state for their amount, since they have not been raised to the dignity of a final judgment: *Rowe v. Rowe*, 76 Or. 491 (149 Pac. 533); *Gilbert v. Gilbert*, 83 Ohio St. 265 (94 N. E. 421, 35 L. R. A. (N. S.) 521); *Bleuer v. Bleuer*, 27 Okl. 25 (110 Pac. 736); *Gaffey v. Criteser* (Tex. Civ. App.), 195 S. W. 1166; *Collard v. Collard*, 7 Ohio App. 53.

7, 8. The first installment is yet to be considered. It was made payable contemporaneously with the rendition of the decree on October 20, 1913; and, therefore, it is for a definite sum payable presently. Is the Minnesota decree, as to the first installment, conclusively final? If it is not conclusively a finality, is it to be treated exactly the same as an installment accruing after the rendition of the decree? If it is neither conclusively final nor to be treated exactly the same as an installment accruing after the rendition of the decree, then is the judgment to be regarded as *prima facie* final? To judgments for a fixed sum of alimony payable presently we may apply the language employed in *Sistare v. Sistare*, when the court there was referring to accrued installments, and say of such judgments for alimony payable presently that generally speaking they create an absolute and vested right to demand and receive immediately upon their rendition whatever amounts are named in them; but we must be mindful of the fact that this general rule is not without exceptions, for in some jurisdictions the power of modification may be exercised retrospectively upon an award which by the terms of the original decree allowing it, was made payable presently. An examination of reported decisions will reveal the fact that in many of

them it was either conceded by counsel or assumed by the court that a decree for a definite sum of alimony payable presently came within the protection of the Federal Constitution; as, for example, in *Cotter v. Cotter*, 225 Fed. 471, 474 (139 C. C. A. 453); *Williamson v. Williamson*, 155 N. Y. 423 (169 App. Div. 597); *Gaffey v. Criteser* (Tex. Civ. App.), 195 S. W. 1166, 1168; *McCullough v. McCullough*, 203 Mich. 288 (168 N. W. 929, 930); *Bleuer v. Bleuer*, 27 Okl. 25 (110 Pac. 736). Courts have frequently said, when speaking in the abstract of judgments for the present payment of a fixed sum of alimony, that they are conclusive in a sister state; as, in *Audubon v. Shufeldt*, 181 U. S. 575 577 (45 L. Ed. 1009, 21 Sup. Ct. Rep. 735, 736, see, also, Rose's U. S. Notes), where we find the following language:

"The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state, and may therefore be there enforced by suit."

Other cases of the same effect as the precedent last cited are *Cureton v. Cureton*, 132 Ga. 745, 751 (65 S. E. 65); *De Vall v. De Vall*, 57 Or. 128, 144 (109 Pac. 755, 110 Pac. 705). See, also, 23 Cyc. 1559. If a decree for the present payment of a fixed sum of alimony is, under the law of the state where rendered, in truth a final determination upon which the court cannot exercise the power of modification, even though conditions have changed since the date of the award, then the way is clear for the enforcement of the decree in a sister state: *Taylor v. Stowe*, 218 Mass. 248, 250 (105 N. E. 890); and, therefore, in jurisdictions where it is held on the one hand that decrees for fixed sums of alimony payable presently are finalities not liable to modifica-

tion, and on the other hand that installments accruing after the date of the decrees allowing them may be vacated and are not finalities but may be modified if conditions have changed, then such accrued installments may as a rule in those jurisdictions be transformed from mere expectancies into final judgments for fixed sums payable presently, by the filing of a petition showing accrual of the installments and their non-payment and asking for an adjudication of the aggregate amount due, as was done in *De Vall v. De Vall*, 57 Or. 128, 144 (109 Pac. 755, 110 Pac. 705).

If, however, an award of alimony even though payable presently is not a finality, and if the court which granted it may nevertheless because of changed conditions vacate or alter the amount allowed, then quite a different situation is presented. If a decree for a fixed sum payable presently may, for exactly the same reasons which would be sufficient for the modification of installments accruing after the decree allowing them, be altered in the state where rendered, and if this decree in these circumstances must nevertheless be treated as a conclusive finality in a sister state, then the necessary result is that such decree is in the state of its origin liable to modification while in another state it is a finality, and hence is there given more faith and respect and greater credit than is accorded to it in the state which gave it existence. If, on the other hand, a sister state refuses to enforce a decree rendered in another state for a fixed sum of alimony payable presently merely because it is possible that conditions have changed upon which the court which rendered the decree may possibly in the exercise of its discretion change the decree, then the inevitable result is that such decree, although capable of enforcement in the state of its origin can never be enforced in the sister

state during the life of the debtor, and therefore such decree would in the sister state receive less faith and respect and be less credited than in the state which gave it life and existence.

If the possibility of modification must be entirely removed and if this fact must be affirmatively shown by the judgment creditor as a condition precedent before an unfaithful husband can in a sister state be compelled to pay alimony or an unnatural father forced to help to maintain his own children, then no decree for the present payment of alimony can ever be enforced in a sister state if the court in which the decree was rendered may, because of possible changes in conditions, in the exercise of its discretion see fit at some future but indefinite time to change the decree. In the very nature of things some period of time will always elapse between the rendition of the decree and the commencement of an action in the sister state where the fugitive husband or father may be found and this period of elapsed time will always afford a basis for the claim that this kind of a decree is not a finality, with the result that the sister state becomes an asylum for marital and parental slackers.

In some respects a decree for alimony payable presently is different from a decree which provides for the future payment of alimony in installments, even though both decrees are liable to modification. One is *res adjudicata* up to the very moment of maturity, while the other is not. One is made on the theory that the money ought to be paid immediately, while the other is not. The statutes of Minnesota afford means for compelling the payment of alimony, for besides other processes the court may make the decree a lien upon real estate or authorize its enforcement by execution against property, real or personal. A decree for ali-

mony payable presently which is capable of enforcement there ought to be made capable of enforcement here.

The plaintiff Hildegard Levine cannot claim for her decree the protection of the full faith and credit clause unless she alleges and proves that it is a finality. The holding in *Rowe v. Rowe*, 76 Or. 491 (149 Pac. 533), is authority for ruling that the installments which have accrued since the rendition of the decree are not entitled to the protection of the Federal Constitution until transformed into a final judgment for a definite sum payable presently, as was done in *De Vall v. De Vall*, 57 Or. 128 (109 Pac. 755, 110 Pac. 705); and when the accrued installments are so transformed they will possess a quality of finality exactly the same as the first installment which became due on the very day when the decree was rendered.

A decree for the present payment of a fixed sum as alimony, even though not absolutely final under the law of the state where rendered, is nevertheless, when unpaid, at least *prima facie* final in a sister state and, in the absence of evidence to the contrary, is sufficient to support a judgment in the sister state: *Wells v. Wells*, 209 Mass. 282 (95 N. E. 845, 35 L. R. A. (N. S.) 561); Section 695, L. O. L. Applying this rule to the instant case we are brought to the conclusion that the plaintiff is entitled to a judgment for the first installment.

9. If the original decree has been modified the defendant may allege and prove the modification and obtain from it the benefit it gives him. If when sued in a sister state the defendant thinks he is entitled to a modification of the original decree, it is apprehended that if a proceeding is pending in a sister state for the enforcement of the decree rendered in another state

such pending proceeding will, upon a proper showing, be suspended and the defendant afforded a reasonable time within which to apply for a modification of the original decree; or, if a modification occurs at any time in the state where the decree originated the court in the sister state "by proper proceedings instituted therein, will give effect to such modification thereby carrying out the requirements of the federal constitution": *Trowbridge v. Spinning*, 23 Wash. 48 (62 Pac. 125, 130, 83 Am. St. Rep. 806, 54 L. R. A. 204). But until the decree is modified in the state of its origin it is to be treated as a final judgment: *Matson v. Matson* (Iowa), 173 N. W. 127, 133; *Paulin v. Paulin*, 195 Ill. App. 350, 352.

10. The complaint does not contain a positive and direct allegation that the Minnesota decree was rendered on October 20, 1913. There is, however, an averment that "on the twentieth day of October, 1913, and for more than two years prior thereto, the plaintiff and defendant were husband and wife," and there is also a subsequent averment that the Minnesota suit terminated in a decree divorcing the parties, granting the care and custody of the child to the plaintiff, and awarding alimony to the plaintiff to be paid to her in installments, "the first payment to be October 20, 1913"; and when those two separate averments are taken together the unavoidable and necessary inference to be drawn from the pleading is that the first installment was payable on the date of the rendition of the decree; and hence this opinion assumes that the first installment was made payable the very day when the divorce decree was rendered. But in order to make "assurance doubly sure," instead of entering a judgment here in favor of the plaintiff for the amount of the first installment as we could do under the terms

of Article VII, Section 3, of the present Constitution, the cause will be remanded to the court below for such further proceedings as may not be inconsistent with this opinion. If the first installment was in truth not made payable on the day when the Minnesota decree was rendered, the defendant should be afforded an opportunity to plead such fact. If, however, the first installment was in reality made payable contemporaneously with the rendition of the decree then the plaintiff is entitled to a judgment for the amount of the installment, unless, of course, it is made appropriately to appear that it has been paid or that by a subsequent modification of the decree the installment has been vacated or the amount of it changed. The plaintiff cannot recover any installments which have accrued after the date of the rendition of the decree until the Minnesota court which granted the original decree adjudicates the amount of the arrears and by such adjudication transforms the accrued installments into a fixed sum payable presently.

11. Although this is an action at law and the appeal has resulted in a reversal, nevertheless, for the same reason that was given in *Rowe v. Rowe*, 76 Or. 491, 497 (149 Pac. 533), and on the authority of *Stabler v. Melvin*, 89 Or. 226, 232 (173 Pac. 896), we do not allow the defendant a judgment for costs and disbursements; and therefore neither party shall have judgment for costs: *Olson v. Heisen*, 90 Or. 176, 181 (175 Pac. 859); *Miller Lumber Co. v. Davis*, 94 Or. 507 (185 Pac. 462).

The judgment is reversed and the cause is remanded for further proceedings. REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON, J., concur.

BURNETT, J. (Dissenting).—In my judgment it is erroneous to assume that the date of the divorce decree

in Minnesota was October 20, 1913, and upon that basis further to assume that the installment of maintenance payable on that day was one payable presently, so as to make the decree *prima facie* final *pro tanto*.

The complaint in the case before us does not expressly allege the date of the commencement of the suit for divorce or of the decree therein. In substance, its statement is that on October 20, 1913, the parties were husband and wife; that prior thereto the wife instituted the suit and that afterwards, without mention of the date, a decree was rendered requiring, among other things, that the first payment of alimony be made on the day mentioned. On demurrer, the pleading attacked is most strongly construed against the pleader. Nothing is taken by intendment. Seeing that the parties were husband and wife on that day, it is quite as permissible to assume that the date expressed for the first payment is void as undertaking to antedate the time of payment, as by a strained construction to impart finality to the pittance of \$12.50, and withhold the same sanction from the arrearages of \$1,300 charged against the defendant. Again, at the commencement of this action on April 30, 1918, fifty-four months and ten days had elapsed since October 20, 1913. The installments payable in that period under the Minnesota decree amount to \$1,350. The plaintiff sues here for only \$1,300. Hence we cannot say, as of a certainty, that she demands the first installment.

Passing this, however, we find in the complaint that in Minnesota, having made an order for maintenance of children involved in a divorce suit, the court may from time to time subsequently revise or alter the order. The statute there makes no distinction between an amount payable presently and one payable *in futuro*.

Both are equally subject to revision. The liability to pay each of them depends on the facts as they exist and are ascertained when the decree is rendered. Thus far both are to be classified as *res adjudicata*. They rest on the same foundation. If the amount of either is to be changed, as it can be under the Minnesota statute, it must be for some new condition arising since the rendition of the decree. For these reasons, based on the doctrine of *Rowe v. Rowe*, 76 Or. 491 (149 Pac. 523), as upon *stare decisis*, I am of the opinion that the plaintiff has not shown a final decree in Minnesota entitled to full faith and credit here, either as to the installment of \$12.50 assumed by construction to be made payable presently, or as to those confessedly accruing afterwards, and hence has not stated a cause of action.

If the complaint is sufficient to allow the plaintiff to recover the trifle of \$12.50, it does state a cause of action and is good as against the general demurrer. The defendant ought to be restricted to his objection as stated. If it is bad at all, it is untenable *in toto*. In that view, the judgment ought to go for the full amount, a result seemingly more consonant with right and justice. Because of the precedents, however, I am of the opinion that the plaintiff should be remitted to obtaining a final judgment in Minnesota conclusively entitling her to such arrearages as the court there shall award her, as illustrated in the De Vall case.

I dissent from the conclusion of Mr. Justice HARRIS.

Motion to strike out bill of exceptions filed June 1, denied July 16, 1918. Argued on the merits December 3, 1919, affirmed January 6, rehearing denied February 10, 1920.

THOMSEN v. GIEBISCH.

(173 Pac. 888; 186 Pac. 10.)

Exceptions, Bill of—Application for Extension—Oral Notice.

1. Under Rule No. 53 of the Circuit Court, a bill of exceptions, tendered by appellants within extended time allowed by Circuit Court on their application after oral notice to respondent's attorneys of their intention so to apply, was tendered in good time.

ON THE MERITS.

Exceptions, Bill of—Use of Form Prescribed With Transcript of Whole Testimony Sufficient.

2. A bill of exceptions conforming to the form prescribed by the proviso in Laws of 1913, page 651, and so having transcript of the whole testimony, is sufficient.

Exceptions, Bill of—Judge must Authenticate the Testimony.

3. Under Sections 172, 932, L. O. L., authentication of the testimony for purpose of bill of exceptions must be by the judge; the reporter's certificate indicating only *prima facie* correctness.

Exceptions, Bill of—Signing by Other Than Trial Judge Allowed by Stipulation.

4. The appellate court will not decide whether the bill of exceptions could properly be settled by a judge other than the one who tried the case; the acceptance thereof by attorneys providing that they will not object to any judge signing it on the ground that it should have been signed by the trial judge.

From Multnomah: GEORGE R. BAGLEY, Judge.

In Banc.

Motion to strike bill of exceptions from the files for the reason that it was not presented and settled within thirty days after the rendition of the judgment.

MOTION OVERRULED.

Messrs. Carson & Brown and Messrs. Emmons & Webster, for the motion.

Mr. James P. Stapleton, contra.

PER CURIAM.—1. The judgment in this case was rendered on January 28, 1918. Rule 49 of the Circuit Court is as follows:

“Any party to a civil or criminal action may within thirty days after the entry of final judgment, tender a bill of exceptions.”

Rule 53 provides:

“The court, upon being satisfied that the adverse party or his attorney has had due notice thereof, may, on application of either party, grant an extension of time to file a bill of exceptions, or a statement of objections thereto, or fix a time for the settlement thereof, but written notice shall not be required.”

On March 4, 1918, appellants, after orally notifying respondent's attorneys of their intention so to do, applied for and obtained an extension of time within which to prepare and tender a bill of exceptions, which bill was tendered within the time so allowed.

Conditions here are exactly the same as in *Francis v. Mutual Life Ins. Co.*, 61 Or. 141 (114 Pac. 921), and on the authority of that case the motion to dismiss is overruled.

MOTION OVERRULED.

Affirmed January 6, 1920.

ON THE MERITS.

(186 Pac. 10.)

Department 1.

The plaintiff sued to recover damages for a deceit alleged to have been practiced upon him by the defendants in the sale to him of some cows to be used for dairy purposes.

Issue was joined on the parts of the complaint imputing fraud to the defendants and affirmative matter was alleged to the effect that the plaintiff was fully advised of the defects of the cattle before he bought. This was traversed by the reply. A jury trial was had, resulting in a verdict and judgment for the plaintiff. The defendants appeal. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Mr. James P. Stapleton*.

For respondent there was a brief over the names of *Messrs. Carson & Brown* and *Messrs. Emmons & Webster*, with an oral argument by *Mr. Thomas Brown*.

BURNETT, J.—The only errors assigned are two, one based upon the court's refusal of the defendants' motion for a nonsuit at the close of the plaintiff's case in chief, and the other upon denial of their motion for a directed verdict at the conclusion of the whole case. The plaintiff contends that these questions are not presented by the bill of exceptions. That document states the issues substantially as above noted, gives four grounds for the motion for a nonsuit, and states the ruling of the court thereon, as well as upon the motion for a directed verdict. No allusion is made to any report of the testimony. The bill is signed by Judge ROBERT G. MORROW, whereas the record discloses that the case was heard before Judge GEORGE R. BAGLEY. Physically annexed to the bill of exceptions above described is a typewritten document of more than one hundred pages, certified by the official reporter of the nineteenth judicial district, to the tenor:

“That the above and foregoing is a full, true and correct transcript of my shorthand notes taken at the

trial of the above-entitled cause in the above-entitled court, of the testimony and the whole thereof."

2. The earlier cases summed up in such precedents as *Keady v. United Railways Co.*, 57 Or. 325 (100 Pac. 658, 108 Pac. 197), and *National Council v. McGinn*, 70 Or. 457 (138 Pac. 493), laid down the rule that a *verbatim* report of the testimony and colloquies between the court and counsel does not constitute a bill of exceptions, insisting that each claim of error should have grouped with it so much of the testimony, and no more, as would be necessary to explain the particular objection. On that principle, in case of error predicated upon a denial of motions for nonsuit and for a directed verdict, it is necessary to set out all the testimony so as to explain the point involved. The doctrine of the previous cases, however, was overturned by the ruling of the majority of this court in *Malloy v. Marshall-Wells Hardware Co.*, 90 Or. 303 (173 Pac. 267, 175 Pac. 659, 176 Pac. 589), based upon the statute of 1913 (Laws 1913, p. 651), reading thus:

"No particular form of exceptions shall be required. The objection shall be stated, with as much evidence, or other matter, as is necessary to explain it, but no more; *provided, however*, that the bill of exceptions may consist of a transcript of the whole testimony and all of the proceedings had at the trial, including the exhibits offered and received or rejected, the instructions of the court to the jury, and any other matter material to the decision of the appeal."

And it was there held in substance that what had before been declared to be insufficient as a bill of exceptions was thereafter to be taken as a proper form of that document.

3. Section 172, L. O. L., says, however, that:

"The statement of the exception, when settled and allowed, shall be signed by the judge and filed with the

clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause.”

The clear intent of the statute is to constitute the trial judge the official and exclusive author of a bill of exceptions. He only can approve that document in its entirety and in every part. All of it must receive his sanction and that must appear from the document itself. The only exception to this rule is found in Section 170, L. O. L., to the effect that if at any time, including that of settling the bill, a disagreement should arise between counsel and the court as to the frame of the document, the former may fortify himself with certain affidavits to be made by disinterested bystanders or by himself and the stenographer who took down the exception. To this a counter-showing may be interposed by the opposite party, and from these data the appellate court shall ascertain the truth of the matter in controversy and decide accordingly. It is true, as stated in Section 932, L. O. L.:

“The report of the official reporter, when transcribed and certified to as being a correct transcript of the stenographic notes of the testimony, exceptions taken, charge of the judge, and other proceedings in the matter, suit, or action, shall be *prima facie* a correct statement of such testimony, exceptions, charge of the judge, and other proceedings, and may thereafter be read in evidence as the deposition of a witness in the cases mentioned in Section 852, and in case of the death, resignation, expiration of the term of office, or vacancy in the office from any other cause of the judge before whom such matter, suit, or action was tried, the exceptions and the statement thereof provided for by Sections 169, 170, 171, and 172, may be settled and signed by the successor in office of such judge or by any judge authorized in such cases to perform the general duties of the judge of such court * * .”

Speaking of the language used in this section, in *Tallmadge v. Hooper*, 37 Or. 503 (61 Pac. 349, 1127), Mr. Justice ROBERT S. BEAN said:

“A stenographer is an officer of the court, charged with the duty of correctly reporting all the proceedings on the trial, and his certificate is entitled to the same faith and credit as that of any other officer. The transcription of his notes, when certified to by him and filed with the clerk of the court where the cause was tried, becomes a part of the record and *prima facie* a correct statement of the testimony and proceedings on the trial, and is entitled to faith and credit as such in the appellate court.”

The learned justice was there treating of the authentication of testimony in an equity case. The matter of a bill of exceptions was not involved. Treating of the same language included in the section above quoted, in *Henrichsen v. Smith*, 29 Or. 475 (42 Pac. 486, 44 Pac. 496), this court in a *per curiam* opinion said:

“The act creating the office of official court reporter in this state provides that his notes, when transcribed and certified to by him as being correct, shall be deemed *prima facie* so (Laws 1889, p. 144,) but it is not provided that such report shall be sufficient evidence from which the successor of the judge who tried the action shall settle and sign a bill of exceptions. The exceptions, when signed, import absolute verity, and, in the absence of a statute declaring the report and certificate of the official reporter of that high character, it would be difficult indeed, in case of a disputed issue of fact, for a judge who had not heard or given attention to the trial of an action to so certify.”

The result to be extracted from all these rulings is that the transcription of the reporter's notes, certified by him, constitutes material from which a bill of exceptions may be compiled; but it was never the intention of any of the legislation or of the decisions up to

this time that the reporter should supersede the judge in authority in the construction of the bill. The only exception to this is the one already noted, based upon a dispute between counsel and the court respecting the truth of the statement of the exception. The reporter's certificate indicates only *prima facie* correctness. It does not import absolute verity. The latter result can be accomplished only by the authentication of the trial judge.

4. It may be remarked in passing that the bill in the present instance was settled by a judge who did not try the case. It would seem from a proper construction of Section 932, L. O. L., that this could not be done except in the case of the death, resignation or expiration of the term of office, or other vacancy in the office from any cause, of the judge before whom the hearing was had; which is not made to appear in the present instance. We do not decide this point, however, in the present case, because we find appended to the bill of exceptions an acceptance of service signed by the attorneys for the plaintiff, in which they "agree not to object to any judge signing the proposed bill of exceptions on the ground that it should have been signed by the judge who tried the case."

For the reasons indicated, however, and for lack of authentication of the report of the testimony by the trial judge, the bill of exceptions in the record is not sufficient to raise the questions involved in the motions already mentioned.

The result is that the judgment of the Circuit Court must be affirmed. AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Submitted on briefs October 2, affirmed December 30, 1919, rehearing denied February 10, 1920.

WILCOX v. WARREN CONSTRUCTION CO.*

(186 Pac. 13.)

Death—Action to be Maintained Directly by Beneficiary.

1. Under employers' liability law, Section 4, as to action for loss of life due to negligence, the action is to be maintained directly by whatever beneficiary is entitled to sue, and not through any intermediary.

Death—Statute Creates Several not Joint Cause of Action in Favor of Widow and Lineal Heirs Which Dies With Her.

2. Under employers' liability law, Section 4, giving a right of action for death to the widow of the person killed, his lineal heirs "or" adopted children, the widow has the exclusive right to sue for death of her husband in her own name; and, where she does not prosecute, her cause of action dies with her, and the husband's lineal heirs, children by a former wife, cannot maintain the action.

Evidence—Common Learning as to Meaning of Conjunction Placed Before Last of Series.

3. It is common learning as a matter of grammar that when in an enumeration of persons or things the conjunction is placed immediately before the last of the series, the same connective is understood between the previous members.

Death—Persons Entitled to Sue.

4. Employers' liability law, Section 4, enumerating persons who may sue for death, is in derogation of common law, and its terms are not to be expanded by implication.

From Multnomah: **ROBERT G. MORROW, Judge.**

In Banc.

In substance the complaint alleges that one Henry J. Wilcox lost his life March 18, 1914, in the service of the defendant owing to some of its negligent acts, and that he left surviving him his widow Gertrude Wilcox, who at the time was insane and died in the insane asylum June 19th of that year. At the time of his death the two plaintiffs were his minor children by a former

*The question as to who may maintain action under the federal liability law is discussed in notes in 47 L. E. A. (N. S.) 67; L. E. A. 1915C, 75. **REPORTER.**

wife. Afterward one of them having attained majority began this suit with her minor brother, who appeared by a guardian, to recover damages under the Oregon employers' liability law: Laws 1911, Chap. 3. The Circuit Court sustained a general demurrer to the complaint and as the plaintiffs refused to plead further, rendered judgment against them, and they have appealed.

AFFIRMED.

For appellants there was a brief submitted over the names of *Mr. Henry S. Westbrook, Mr. F. J. Casterline* and *Mr. L. E. Casterline*.

For respondent there was a brief prepared and submitted by *Mr. John F. Logan*.

BURNETT, J.—As it stood at the time of the commencement of this action, Section 4 of the enactment mentioned read thus:

“If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded.”

1, 2. The theory of the plaintiffs as outlined in their brief is that although the widow had a cause of action, yet on her death it passed to the next on the list, namely, the plaintiffs, who are the decedent's lineal heirs. The question of the distribution of the proceeds of a possible recovery is not here involved for it is not mentioned in the statute. The amount recovered does not pass through the hands of the executor or admin-

istrator of the defendant's estate and forms no part of the assets of such an estate. The action under this section is to be maintained directly by whatever beneficiary is entitled to sue and not through any intermediary. There are many statutes which require the action to be brought by the personal representative of the decedent and which direct the distribution of the amount recovered. The federal employers' liability law is not a criterion by which to consider our own enactment, because the former requires the action to be brought by the personal representative in all cases:

"For the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee": Act April 22, 1908, Chap. 149, § 1; 35 Stat. 65 (U. S. Comp. Stats. § 8657); 1909 Supp. Fed. Stats. Ann. 584.

In any view of the case, the word "or" in the phrase "widow or husband" appearing in the federal statute cannot be construed conjunctively, because in this country it is impossible for a decedent to leave as his survivors both a widow and a husband. Such a situation might happen in countries where polygamy or polyandry is in vogue, but not in America. The phrase in the federal statute evidently designs to make the surviving spouse and children constituents of the first group of beneficiaries. The Oregon law does not group individuals of different degrees of kinship, but leaves them separate.

The crucial question in the instant case involves a construction of Section 4 so as to determine whether the widow had a right to institute the action in her own name to the exclusion of the children or whether she and they must necessarily join as plaintiffs if she were alive; in other words, whether both the widow and the

children of the survivors of the group are jointly interested in the recovery. *Henderson's Admr. v. Kentucky Cent. R. R. Co.*, 86 Ky. 389 (5 S. W. 875), is relied upon to sustain the doctrine that our statute must be construed so that the recovery in the first instance must be had at the suit of the widow and lineal heirs. The statute of Kentucky under which this decision was rendered declared that in case of loss of life by the neglect of another person, "then the widow, heir or personal representative of the deceased shall have the right to sue such person, * * company, * * corporation, * * and recover punitive damages." The court there said:

"According to the plain language used, either the widow, heir or personal representative may sue; but it is equally clear that each of them cannot maintain a separate action for the same cause; for, as held in the case of *Louisville and Nashville R. R. Co. v. William Sanders*, 86 Ky. 259, but one recovery can be had."

Further discussing the subject and referring to the law of that state giving to the widow preference in granting letters of administration, the court said:

"But notwithstanding such appointment, she may still sue under the section we are considering in her own right as widow, and not as the personal representative of her deceased husband. It being thus in her power in virtue of a statute already existing to take precedence of the personal representative, at least when the husband dies intestate, it is a reasonable inference, because necessary to make the statute consistent, that the legislature intended she should have it in every case arising under that section. And if that be so, it seems to follow that no part of what she may recover in such case is to become assets of the estate of the decedent."

The reasoning which seems to control the Kentucky court is found in the fact that under another section of

the general statutes, "the widow and minor child or children or either * * of a person killed by the careless, wanton or malicious use of firearms," may recover damages. The court decided that as this was part of the harmonious system embodied in the general statutes it should govern in the particular statute involved in the case and give a joint action in favor of the widow and children. Finally, the action of the administrator was dismissed because after he had sued at the request of the widow she began an action in her own name to recover for the same injury. It is not apparent why the widow should have precedence so that her action commenced later would oust that of the administrator already instituted, unless the order in which the litigants were named in the statute controlled the right.

Felton v. Spiro, 78 Fed. 576 (24 C. C. A. 321), was an action brought in the Circuit Court of the United States of the Eastern District of Tennessee by a widow to recover from the receiver of the railroad company for the death of her husband, who was a passenger on one of its trains. The question under consideration was the right of the plaintiff to prove the number of children surviving the deceased. The case turned upon a construction of the amended form of the Tennessee Code of 1858 on this subject. Section 2291 of that Code provided that the right of action of the person who dies from injuries received from another is not extinguished by his death, "but shall pass to his personal representative, for the benefit of his widow and next of kin, free from the claims of his creditors." The next section allowed the widow and children of the deceased, on giving a proper bond, to sue in the name of the personal representative if he refused to proceed, and finally Section 2293 provides that if the

deceased had commenced an action before his death it should proceed without a revivor and that the damages recovered should go to the widow and next of kin free from creditors' claims, to be distributed as personal property. It will be noted that in each of the three sections the widow and children named in the statutes are united by the conjunction "and," which is not so in the Oregon statute. Later on, Section 2291 was amended so that a cause of action "shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin"; and Section 2292 was so amended as to allow the "widow, or if there be no widow, the children, to prosecute suit." The court was influenced in its decision and based it upon the ground that inasmuch as Section 2293 had not been amended and under it the damages should go to "the widow and next of kin," and that the whole object of the amendment was merely to remove the necessity for bringing action in the name of the personal representative, the three sections of the statute should be construed together so as to make of the widow and children one group of beneficiaries. Reluctantly the court arrived at the conclusion that in Section 2291 the words "widow or next of kin" should be read as if the phrase were "widow and next of kin," and finally said:

"All the circumstances taken together lead to the conclusion that the change of 'and' to 'or' was not to effect a change in meaning as to the beneficiaries, but arose from a mere carelessness in the use of language."

The principal thought in that case was about the persons who were entitled to participate in the benefits of the litigation. Here, we are not concerned about the division of the possible recovery. The question here

is: Who is the necessary party plaintiff? On this point *Felton v. Spiro* is not a precedent favoring the plaintiffs. That case has never been cited since on the question of parties, so far as a careful research has revealed, but has been referred to many times in connection with granting new trials.

A very instructive precedent on the question of construing "or" to mean "and" is *Isaac v. Denver etc. R. Co.*, 12 Daly (N. Y.), 340. This was an action in the courts of New York to recover upon a liability defined by the statute of the then territory of New Mexico, which provided as a third classification that "if such deceased be a minor and unmarried," the father and mother might join in the suit. It happened that the decedent had reached the age of majority but was single. The plaintiffs contended that the intention of the legislature was to give a cause of action so that the phrase should read "if the deceased be a minor or unmarried." The court there said:

"It is a rule in the exposition of statutes, that they are to be construed with reference to the principles of the common law, and therefore the law infers that the act did not intend to make any alteration other than what is specified (Dwarris on Statutes, 695). The words 'or' and 'and' are not always, in deeds and wills, held to a strict grammatical sense; but 'or' may be taken for 'and' and 'and' for 'or' as may best comport with the intent and meaning of the grant or devise (*Jackson v. Blanshan*, 6 Johns. (N. Y.) 57 [5 Am. Dec. 188]); and this may be done in a statute, but there should be strong reasons, in conformity with a clear intention (Potter's Dwarris on Statutes, 199, note 16), because it is a much more serious matter to make such a change in a statute, as a statute is general in its operation; and it certainly should not be done unless it is very clear that such was the intent, taking the whole of the statute together, the general rule being, in re-

spect to statutes, that words are to be taken in their ordinary sense, and not to be extended or changed to comprehend cases within the supposed intention of the legislature, as courts cannot correct supposed errors, omissions or defects in legislation; the office of the courts being, as has been said by Dr. Leiber, to bring sense out of the words, and not bring a sense into them."

Another case is *Webb, Admr., v. Railway Co.*, 88 Tenn. 119 (12 S. W. 428), where it is decided that the widow has preference as plaintiff over the administrator, but may waive it in his favor, making him a proper plaintiff, because in any event the recovery must be for the widow and next of kin. Our statute is not complicated like the Tennessee enactment by the inclusion of the personal representative as a plaintiff or by direction as to the disposition of the fund recovered in the action. Both these elements are taken into consideration in the decision based on the Tennessee statute on the distribution of the money recovered but do not seem to have influenced the disposition of the contention about who has preference as plaintiff. Further, in *Spitzer v. Knoxville Iron Co.*, 133 Tenn. 217 (180 S. W. 163), the court says:

"The substance of these decisions is that the widow's right of action is prior and superior to that of the administrator; that the latter cannot sue until she waives her right, albeit in addition to an express waiver, she may effect a waiver by merely permitting his suit to stand without objection on her part; that she may compromise the demand at any time before the administrator, pursuant to her waiver, has brought a suit, but not afterwards; that likewise she may compromise the claim before suit brought, or after a suit brought by herself as widow at any time, regardless of the protest of her children; that after suit has been brought by the administrator the action can be compromised only by consent of the widow and children."

Likewise in *Atlanta K. & N. Ry. Co. v. Hooper*, 92 Fed. 820 (35 C. C. A. 24), the court quotes the Tennessee Code and so construes it that a change of the beneficiary by an amendment of the complaint is a change of the cause of action and is not allowable in face of the statute of limitations. Again, in *Sanders' Admx. v. Louisville & N. R. Co.*, 111 Fed. 708 (49 C. C. A. 565), the circumstances were that Martin J. Sanders died without children or widow. His father, Martin Sanders, was next of kin and assigned his chose in action to Kate G. Sanders individually and in trust for her mother, brother and sisters. The father died *pendente lite* and the court held that it abated the action. The case of *Railroad v. Bean*, 94 Tenn. 388 (29 S. W. 370), is an instructive precedent, the court there using this language:

"The right of recovery having once vested in the widow, it did not pass, upon her death, to her personal representative; neither did it revest in the next of kin of deceased for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished."

Other Tennessee cases are *Holder v. Railroad Co.*, 92 Tenn. 142 (20 S. W. 537, 36 Am. St. Rep. 77); *Stephens v. Railroad Co.*, 78 Tenn. (10 Lea) 448; *Loague v. Railroad Co.*, 91 Tenn. 458 (19 S. W. 430), all indicating that the widow is entitled to control the litigation. If she may compromise the claim to the exclusion of and even against the protest of her children, it is not apparent why she is not of paramount standing in the role of plaintiff. All these cases indicate recognition of the order in which the beneficiaries' names are placed as controlling the question of who shall be plaintiff.

As pointed out before, the statutes of Tennessee and Kentucky are materially different from ours concerning the proper parties plaintiff. More like the Oregon statute is that of the Missouri Code quoted in *Cole et al. v. Mayne* (C. C.), 122 Fed. 836, reading thus on the point involved:

“And in case of loss of life by reason of such violation or failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any person or persons who were, before such loss of life, dependent for support on the person or persons so killed.”

Judge Phillips, construing this enactment, said:

“The plain grammatical construction of this statute, which names the beneficiaries disjunctively, gives the right of action, first, ‘to the widow of the person so killed’; next, ‘to his lineal heirs or adopted children’; and, third, if there be no widow, lineal heirs or adopted children, ‘to any person or persons who were, before such loss of life, dependent for support on the person or persons so killed.’ * * The necessary conclusion from which is that the statute does not give a joint cause of action to all the designated beneficiaries, but an exclusive cause of action to the parties designated, if living, in their order. The logical result therefrom is that no cause of action under this statute arises in favor of the children where the deceased left a widow.”

To the same effect is the utterance of the Supreme Court of Missouri in *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232 (56 S. W. 1091). Speaking of this same enactment, Mr. Justice BURGESS says:

“The statute is complete within itself and in no way depends for its enforcement upon any other statute, not a part or amendatory thereof. It gives to the widow a right of action, the only limitation upon which is, that she bring her suit within one year after the death of her husband. It says that in case of the death of the

husband, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, etc., which clearly means first to his widow, next to his lineal heirs or adopted children, and not to them jointly. The petition shows that the action was brought within the prescribed time, and no allegations with respect to the children of the deceased were necessary. Her right of action was not affected by the fact that deceased left children surviving him, notwithstanding he did in fact do so."

The Pennsylvania statute of 1855 involved in *March v. Railway Co.*, 204 Pa. 229 (53 Atl. 1001), was to this effect:

"The persons entitled to recover damages for an injury causing death, shall be the husband, widow, children or parents of the deceased and no other relative"

—and it was held that if the deceased left a widow and child, the right of action would clearly be in the widow and in her alone.

Another case based upon the Pennsylvania statute is *Di Palo v. Laquin Lumber Co.* (C. C.), 178 Fed. 877. The court there said:

"The right of action is statutory and peculiar, and the statutes by which it is given must be complied with. If death does not immediately ensue and action is brought by the injured party in his lifetime it must be continued after his death by his personal representatives; no new suit being admissible. * * If no such action, however, is brought, the right to sue for the death is vested solely in the widow, if any, or if not, in the others named in the order they are given. * * And, where the widow is disqualified, there is apparently no provision for suit being prosecuted by others. The right of action also is single and indivisible; a recovery being had, if at all, for the whole damages sustained, whoever may be ultimately entitled to them. * * And, where there is a husband or widow, children are not only not necessary, but not even proper parties; how-

ever, it may be necessary to name them in the declaration.”

An analogous case is *Belding v. Black Hills & Ft. P. R. Co.*, 3 S. D. 369 (53 N. W. 750). The statute there says:

“If the life of any person * * is lost or destroyed * * then the widow, heir, or personal representatives of the deceased shall have the right to sue.”

Mr. Justice Corson, writing for the court, uses this language:

“The section seems to have been adopted with another object in view, and that was to give the widow, having in the death of her husband sustained the greater loss, the prior right to institute the action and recover the damages she has sustained by reason of the death of her husband; and in case there is no widow, then to give the heirs the right to sue and recover the damages resulting to them from the loss of the life of the deceased. To carry into effect the evident intention of the legislature, the widow should have the prior and exclusive right to institute the action and to the damages for the loss of the life of the husband. When there is no widow, then the heirs are given the same prior and exclusive right to sue and recover such damages as they have sustained by the death of the person. It cannot be presumed the legislature intended that the right to bring action should be determined by the vigilance or nonvigilance of the respective parties. * * The intention that the damages should go to the widow, and in case there was no widow then to the heirs, if any, is so manifest that to hold otherwise would be clearly in direct opposition to the intention of the law-making power. No apportionment of the damages recovered is provided for, and hence the conclusion is irresistible that the widow has prior and exclusive right to institute the action and to the damages.”

In Pennsylvania the right to sue is vested in the “husband, widow, children or parents of the deceased.”

It was held in *Lewis v. Humlock's Creek etc. Co.*, 203 Pa. 511 (53 Atl. 349, 93 Am. St. Rep. 774), that "They cannot all claim jointly, but each class in its own right and own order." *Haughey v. Pittsburg Ry. Co.*, 210 Pa. 367 (59 Atl. 1112), declares that the widow must sue alone without joining the children. *Shambach v. Middlecreek Electric Co.*, 232 Pa. 641 (81 Atl. 802), holds that the widow is the party exclusively entitled to sue and may compromise the action even as against the children, if she acts in good faith and without being overreached.

Hart v. Penwell Coal Min. Co., 146 Ill. App. 155, was a case arising under a statute saying, "A right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children" or to certain dependents named. The court said:

"The statute gives the right of action first to the widow if she survives; second to the lineal heirs or adopted children in case the widow does not survive," etc.

In *Beard v. Skeldon*, 113 Ill. 584, the court, under the statute noted above announced the doctrine that—

"The right of action is conferred in the alternative, and when one party entitled to sue, brings a suit, all damages which may be recovered on account of the death, must of necessity be obtained in the judgment rendered in the suit."

Flash v. Louisiana etc. R. R. Co., 137 La. 352 (68 South. 636), is reported also in L. R. A. 1916E, where the subject under consideration is extensively treated in the note which may be read with profit in this connection.

In *Lawton v. Morgan, Fliedner & Boyce*, 66 Or. 292 (131 Pac. 314, 134 Pac. 1037), this court had under consideration the enumeration of persons liable under Sec-

tion 1 of the statute included in the language, "all owners, contractors, subcontractors or corporations, or persons whatsoever." Mr. Justice MOORE said:

"The use of the word 'or' as last quoted, would seem to indicate that for the recovery of damages sustained by a personal injury a several and not a joint liability was contemplated. * * In the latter part of the section adverted to it will be remembered that 'all owners, contractors, or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees, or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb.' It will be observed that, while the word 'or' is understood to be used and employed between the phrase and words 'all owners, contractors or subcontractors,' the word 'and' immediately follows the latter word preceding the phrase 'other persons.' The individuals thus referred to are the persons 'having charge of, or responsible for, any work involving a risk or danger to the employees or the public.'" From an examination of the entire act it is believed that the connective used between the word 'subcontractors' and the phrase 'other persons' should be 'or' thereby manifesting a legislative purpose to create a several and not a joint liability resulting from an injury to an employee, caused by the negligence of either of the persons designated, when engaged in the construction of any building."

This deliverance of Mr. Justice MOORE was supported by an opinion written by Chief JUSTICE McBRIDE, who dismissed the motion for rehearing with the comment that "we would be compelled to read something into the law that is not written there, to hold them liable." In *Tamm v. Sauset*, 67 Or. 292 (135 Pac. 868, L. R. A. 1917D, 988), Mr. Justice McNARY considered the enumeration of parties liable under Section 3 of the act in question which reads thus:

"It shall be the duty of owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work to see that the requirements of this act are complied with," etc.

He there treated the language as disjunctive, saying in this connection:

"The evident intent of the statute was to hold responsible, for personal injuries to an employee, only that member of the class enumerated who was engaged in the undertaking or enterprise embraced in the statute whereby the injury occurred. To conceive otherwise would be going wide of the rule established by this court in the case of *Lawton v. Morgan, Fliedner & Boyce*. * * The initiative act does fix a high standard of care, a violation of which is negligence *per se*, but lays that care to the door of the person having the work in charge, and in consequence thereof the application of the enactment must be circumscribed to that particular source from which or from whom authority and control of the instrumentalities and individuals emanate."

In *McDaniel v. Lebanon Lumber Co.*, 71 Or. 15 (140 Pac. 990), Mr. Justice MOORE said:

"The cause herein is prosecuted by the widow of the person killed, who alone is entitled to the recovery which is unlimited in amount, and not restricted by the damages which the decedent's estate may have sustained, but is to be measured by the pecuniary loss suffered by the person entitled thereto."

In *Hawkins v. Anderson & Crowe*, 84 Or. 94 (164 Pac. 556), Mr. Justice BEAN treating of this very Section 4 under consideration said:

"A judgment under the enactment of 1910 in favor of the widow of the person killed is a bar to another action in favor of the other relatives named, and a recovery by either of the beneficiaries named therein would preclude a recovery under Section 380, L. O. L."

If the lineal heirs are by the statute made jointly interested with the widow in suing for damages, it is inconceivable how they would be barred by a judgment in favor of her alone to which they were not parties. The deduction is plain that no cause of action accrues to lineal heirs or to any other relatives mentioned subsequently in the list on the death of the ancestor if his widow survived him.

Evidently the author of this opinion had in mind the rule of construction which he declared in *McClagherty v. Rogue River Electric Co.*, 73 Or. 135, 154 (140 Pac. 64, 71), in this language:

“Such statutes, while they are not to be strictly construed, are not to be extended by implication, as they are in derogation of the common law.”

The principle that the order in which the prospective plaintiffs are named in the act controls the preference is established in *McFarland v. Oregon Elec. Ry. Co.*, 70 Or. 27, 40 (138 Pac. 458, 462, Ann. Cas. 1916B, 527), wherein speaking of Section 4 of the Employers' Liability Act under which this action was instituted, Mr. Justice MOORE says:

“It is believed that, when these sections are construed together, the damages that are recovered in the action for the loss of life of a person killed by the act or omission of another is by Section 4 of the enactment given to the person or persons there specified in the order stated; that such beneficiaries ‘as the case may be’ are the only persons who can maintain an action for the injury sustained.”

What may be termed a legislative construction of this statute is found in the amendment of Section 4 embodied in the act of March 3, 1919, Laws of 1919, Chap. 270, which adds to the original section a provision that:

"If none of the persons entitled to maintain such action reside within the State of Oregon then the executor or administrator of such deceased person shall have a right to maintain such action for their respective benefit in the order above named."

3. It is common learning as a matter of grammar that when in an enumeration of persons or things the conjunction is placed immediately before the last of the series the same connective is understood between the previous members. If the disjunctive conjunction "or" is used the various members of the sentence are taken separately while if "and" is used they are to be considered jointly. For instance, deeds are to be acknowledged "before any judge of the Supreme Court, county judge, justice of the peace or notary public": Section 7109, L. O. L. It is manifest that the officers named are to be taken separately and that the acknowledgment is not to be taken before all of them. The service of one is sufficient. Other illustrations will readily occur to the mind.

"Or" is defined as a "disjunctive often with either or whether as a correlative, used to introduce a word or phrase expressing an object or action, the acceptance of which excludes all the other objects or actions mentioned": Standard Dictionary, 1733.

If the enumeration of persons liable coupled with the disjunctive "or" defines a several and not a joint liability, equivalent language in enumerating persons entitled to recovery assuredly creates not a joint cause of action, but a several one. It will be noted that the word "and" does not occur at all in Section 4. It would be a strained construction bordering on opportunism to hold that the phrase "any owner, contractor or subcontractor, or any person liable under the provisions of this act," gives rise only to a several liability,

while the later clause in the same section "the widow of the person so killed, his lineal heirs or adopted children or the husband, mother or father as the case may be" shall be the foundation of a joint action in favor of the widow and lineal heirs, or any other combination of the relatives named. It is a construction inspired no doubt by the benevolent desire to make provisions for minor children but it is not thus written in the law.

In the language of the court in *Huberwald v. Railroad Co.*, 50 La. Ann. 477 (23 South. 474):

"We feel for those who are left without a supporter and advisor owing to accident, and are not inclined to a conclusion debarring them from the right of ascertaining whether there was actionable negligence. But we must interpret the law as it is written—*jus discere, et non jus dare* is the part of the court."

Wherever this court has spoken of the enumerations of parties in the employers' liability law, employing the disjunctive "or", it has treated the persons included in the category separately and not jointly and the great weight of authority is in favor of such construction. Since the rulings of this court on this subject, the legislative assembly has reiterated the doctrine that the recovery is to be had in the order named. If we are to construe "and" into the section of the statute to which it is a stranger, there would be no logical reason for not reading it in before each item in the list of relatives, with the result that we will be driven to the conclusion that in all cases the widow and lineal heirs and adopted children and the husband and the mother and the father or such of them as may survive the decedent, may join in an action to recover for the death. If "and" is to be inserted in one place or if it is to supplant "or" in any place, it must do likewise

in all. The result would be absurd and contrary to the almost universal course of authority.

4. The statute is a drastic enactment substantially making the employer an insurer against all manner of casualty which may happen to an employee; for the persons named in the statute are required to use every practicable device, care and precaution for the safety of those employed without regard to expense and limited only by the efficiency of the plant. Being in derogation of the common law, its terms are not to be expanded by implication as we held in the *McClagherty* case; and the judiciary cannot go beyond its boundaries. That is the prerogative of the legislative branch of the government which the courts cannot assume even to relieve a present hardship. The widow, having been invested with a cause of action by the death of her husband, was at liberty to prosecute it or not. If she did, she was under no obligation to divide the proceeds with any of the decedent's other relatives. If she did not prosecute, either in her own proper person or by guardian, her cause of action died with her and did not pass to another, being personal to herself. The demurrer was properly sustained as a matter of law and the judgment should be affirmed.

AFFIRMED. REHEARING DENIED.

BENNETT, J., Dissenting.—Henry Wilcox, the father of the plaintiff, was killed in an accident while in the employ of the defendant company. He left a widow by a second marriage, who was then insane and who died in the state hospital for the insane about three months after his death. The deceased also left two orphan children by a previous marriage, who were minors at the time of his death, and who are the plaintiffs herein. A demurrer to the complaint was sus-

tained in the court below, and the question here, is whether or not the plaintiffs—minor children of the deceased—have a right to recover for their father's death under the Employers' Liability Act of 1911; or whether the sole right to sue for his death was vested in the widow, and entirely extinguished by her death.

That part of the provision of the act of 1911, which is important here, is as follows:

“The widow of the person so killed, his lineal heirs, or adopted children, or the husband, mother or father, as the case may be, shall have a right of action, etc.”

It is urged on behalf of respondent that under the provisions of this act the widow of Wilcox was, at the time of his death, the *sole* beneficiary, and that when she died the action was either extinguished, or the right passed to her legal heirs, in preference to the children of the deceased.

This act does not seem to have ever been construed by the courts of this state, as between the widow and the children of the deceased.

In *McFarland v. Oregon Elec. Ry. Co.*, 70 Or. 27 (138 Pac. 458, Ann. Cas. 1916B, 527), the court construed the latter clause of the act, as to who was the beneficiary between the mother and father, and it is claimed by the respondent that the general language of the opinion covered the case of a widow and child, as well as the question which was then before the court.

In that case the court held that the mother was the sole beneficiary to the exclusion of the father, saying:

“It is believed that when these sections are construed together the damages that are recovered in the action for the loss of life * * are * * given to the person or persons there specified in the order stated.”

However, as the question of preference between the widow and the orphan children was not before the court

in that case and, as there is much ground for distinction between the priority of the mother and father on the one hand, and those of the widow and children upon the other, we must, according to recognized principles, assume that the court only intended to pass upon the question that was really presented in the case for decision, and that its language is limited to that question.

In Wells on Res Adjudicata and Stare Decisis, Section 583, it is said:

“The reasoning, illustrations and references contained in the opinion of a court, are not authority or precedent: but only the points arising in the particular case, and which are decided by the court.”

And again in Section 584:

“Language used in an opinion, whether in the reasoning or the conclusion established thereby, is always to be explained and restricted by the case under consideration, and to that extent only is a decision fitted to serve as a precedent.”

In Black's Law of Judicial Precedents, page 38, it is said:

“But the opinion may far outrun the decision, not only in the way of including inferences and illustrations, but also in the way of noticing points not essential to the final conclusion or laying down principles of law far broader than is necessary for the particular case in judgment. In that case, it has no authority as a precedent beyond the point or points actually and necessarily decided.”

There is so much difference, in the relation and dependency of the mother and father upon a son, on the one hand, and of a widow and children, with reference to the husband and father, upon the other, that the order of priority as between the mother and father, ought hardly to be conclusive as between the widow and

children. And this is especially true where the language defining their relative rights is different. Ordinarily the mother is less able to take care of herself—less independent—and more likely to be dependent upon her son for support than the father, and there might be some reason for giving her a preferred right. But this could hardly be said as to the widow and children, both of whom may be assumed to be wholly dependent upon the husband and father for their support. Again, the disjunctive “or” is used between “mother” and “father,” which may have some significance as tending to show that it was intended that they should take alternatively, while the conjunction between “widow” and “lineal heirs” is entirely omitted and left to be supplied or inferred from the context and general nature of the law.

Where there is so much to distinguish, I assume that the court in the McFarland case only intended to pass upon the question which was before it, and leave the different question as between the widow and children, to be decided at such time as it might actually arise.

The construction of the section of the Laws of 1911, already quoted, seems to depend upon what conjunction is understood and interpolated after the word “killed” and before the word “his.” If the word “and” is interpolated it would read thus:

“If there shall be any loss of life the widow of the person so killed (and) his lineal heirs or adopted children, etc.”

Read thus it would clearly indicate that the widow and children were to take together and not by preference, and that each should recover for his own individual injury. On the other hand, if the word “or” is interpolated, it would read thus:

“If there shall be any loss of life the widow of the person so killed (or) his lineal heirs or adopted children, etc.”

—and would have some tendency to indicate the intention to give a preference on behalf of the widow, although it would not be conclusive because the word “or” in such statutes is sometimes construed as “and” in spite of the direct use of the disjunctive: 2 Sutherland on Statutory Construction (2 ed.), § 397.

It seems to be well settled under the authorities that where the beneficiaries are grouped in different groups, and one group is given preference over another group, that the first group takes, to the exclusion of the latter one, and that upon the death of all of the former group the liability is extinguished: *Woodard v. Railway Co.*, 23 Wis. 400; *Frazier v. Railroad Co.*, 96 Ga. 785 (22 S. E. 936); *Railroad Co. v. Bean*, 94 Tenn. 388 (29 S. W. 370); *Webb, Admr., v. Railroad Co.*, 88 Tenn. 119 (12 S. W. 428); *Duval v. Hunt et al.*, 34 Fla. 85 (15 South. 876).

The serious question in this case, however, is as to whether the law really intended to make a separate grouping, as between the widow and the children, or whether they were all intended to be included in one group. There seems to be only four states in which the question has been passed upon as between the widow and children, under statutes similar to our own. These states are Missouri, South Dakota, Kentucky and Tennessee. In Missouri the statute is almost exactly like our own, and it has been construed as giving the widow the preference right to the exclusion of the children: *Hamman v. Central Coal Co.*, 156 Mo. 232 (56 S. W. 1091).

The same construction was given by the Supreme Court of South Dakota to a statute in that state, which, while not by any means identical with our own, is very similar in its wording: *Belding v. Black Hills Co.*, 3 S. D. 369 (53 N. W. 750).

On the other hand, in Kentucky and Tennessee, under statutes worded almost exactly like our own as to the order of the beneficiaries, the courts have given them a construction giving the widow and children equal preference rights, and permitting each to recover compensation for his own injury, in one action to be brought by or for the benefit of all.

In Kentucky the provision is, that "the widow, heir, or personal representative of the deceased shall have the right to sue." Under this statute it was held that there was no preference as between the widow and children, but that both of them took in preference to the personal representative: *Henderson v. Railway Co.*, 86 Ky. 389 (5 S. W. 875).

In Tennessee an amendment to the Code of that state provided that, while the action could be brought only by the widow, it should be brought "for the benefit of his widow or next of kin."

It was held by the Circuit Court of Appeals for the Sixth District in an opinion rendered by Judge TAFT in *Fleton v. Spiro*, 78 Fed. 576, 578 (24 C. C. A. 321, 324), that the word "or" in this clause should be construed and read as "and," the court saying:

"It is not uncommon, in order to carry out the object intended by the legislature, for courts to construe 'or' as meaning 'and.'"

The same construction of the same statute was made by the Supreme Court of Tennessee in *Webb, Admr., v. Railroad Co.*, 88 Tenn. 119 (12 S. W. 428).

The Federal Employers' Liability Act provided that the action shall be brought by the personal representative "for the benefit of the surviving widow or husband and children of such employee": U. S. Comp. Stats., § 8657; 8 Fed. Stats. Ann., p. 1208.

Under this act it has been held, that while the widow and children take by preference over remoter heirs, yet as between themselves, they take together and not by group, and that each could recover for his or her own respective injury—all to be included in one action to be brought for the benefit of all the beneficiaries.

It is urged on behalf of the respondent that the federal statute is conjunctive in its terms, while ours is disjunctive; but it will be noticed that there is just as much reason to construe that statute as disjunctive, as between the widow and children, as there is to give our statute such construction.

When we view this law as a matter of first impression, it seems difficult to resist the conclusion from the whole body of the act, that the legislative intent, was to give compensation both to the widow and children for the loss which they suffer by reason of the negligence or wrongful act of another, causing the death of the husband and father. That this law was intended to be compensatory in its character is now well settled: *McFarland v. Oregon Elec. Ry. Co.*, 70 Or. 27 (138 Pac. 458, Ann. Cas. 1916B, 527; *Fisher v. Portland Ry., L. & P. Co.*, 74 Or. 229 (137 Pac. 763, 143 Pac. 992, 145 Pac. 277).

Under such a statute the widow cannot, of course, in any event, recover anything for the loss which the children may have suffered by reason of the death of the parent. She can only recover for her own loss. If the children are shut out by her, then they will receive no compensation whatever, nor will anyone receive any

compensation on their behalf. They were just as dependent upon the deceased for their support—indeed, more dependent—than the widow. In many cases the widow is only a stepmother to the children and under no obligation whatever for their support after the death of the father. In many other cases, as in this case, she may die before a recovery. It seems to me unquestionable, that one, and indeed the principal intent of the legislative mind in adopting this law, was to provide a means of support for the widow and children whose natural support is taken away. To adopt the construction urged by respondent would deprive the children of any support whatever, and leave them in many cases to become a burden upon society, while the defendant, whose negligence caused the death of the father, would be relieved of all liability.

To suppose that the people, in enacting this law, intended to recompense the widow for her injury, but to leave the helpless children without any recompense or support whatever, is to suppose that they have made a distinction without any reason whatever, and that the law instead of being a consistent and co-ordinate thing, with a reasonable and harmonious purpose, was the mere expression of an inconsistent whim—giving to one and taking away from another, utterly without any reason or distinction.

In Sutherland on Stat. Const. (2 ed.), Volume 2, Section 490, it is said:

“Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardships or injustice; in construing an act of the general assembly, such a construction will be placed upon it as will tend to advance the beneficial purposes manifestly within the contemplation of the general assembly at the time of its passage; and courts

will hesitate to place such a construction upon its terms as will lead to manifestly absurd consequences."

In *Quenn v. Clarence*, L. R. 22 Q. B. 23-65, it is said by Lord Chief Justice COLERIDGE:

"In such a matter as the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is in my opinion, good reason for believing that the construction which leads to such results cannot be the true construction of the statute."

The majority of this court are interpolating the word "or" between "widow" and "lineal heirs," and then giving the clause an alternative construction which shuts the children out entirely, if there happens to be a widow at the time of the father's death.

The trouble with this construction of the law, as it seems to me, is that it entirely overlooks every cardinal principle of statutory construction, except the one uncertain, inconstant and obscure grammatical rule, that when the conjunction "or" is used between the two last of a series of terms, it shall be read in between each of the other terms, and as so interpolated shall have an invariable alternative construction. As we have already seen, this rule is almost as often broken as it is observed. It is a small nicety of the English language, which has never been closely followed, either by those who use the language or by those who construe it. It is of little more importance than the correct use of punctuation marks, which all courts disregard where they conflict with the general purpose of a law.

In 29 Cyc. 1505, it is said:

"The word 'or' is often used and has been often construed as if it were 'and' in statutes."

And to support the text the work cites the decisions of the courts of California, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, New Jersey, New York, North Carolina, Pennsylvania, West Virginia and Wisconsin.

And yet we are asked to follow this small grammatical rule to the length of disregarding the evident intent of the law, the general purpose for which it was enacted—the “evil to be remedied” and to give it the unreasonable interpretation which would shut out an adopted child, because there happened to be a natural one—shut out a crippled and dependent husband, because there happened to be a grown son not at all dependent—and shut out even the natural children, however poor and dependent they may be, because, as in this case, they happen to have a stepmother who is alive at the time of the father’s decease.

Under the law as it stood before the enactment of the liability law, the administrator could bring an action for the death of the husband and father and recover \$7,500. Ordinarily where the estate is solvent, the children would receive one half of this recovery and the widow the other half. The employers’ liability statute, as construed by this court, takes away this right of recovery, as long as there is any beneficiary under the latter act (*Niemi v. Stanley Smith Lbr. Co.*, 77 Or. 221, 227 (147 Pac. 532, 149 Pac. 1033), and therefore destroys any hope of relief and support or recompense for their loss which the children had under the old law.

If we construe this law as giving the children nothing where there is a widow, it ceases to have the benign and beneficial effect, enlarging the rights of those who are injured by the negligent killing of the father and husband, which was clearly intended by its makers;

and becomes instead, a monstrous thing which not only fails to provide them any further recompense for their loss, but actually takes away the small compensation, which they would ordinarily have enjoyed under the old law.

I do not think this law should be considered a drastic one in any harsh or unreasonable sense. On the contrary, I think its every principle is in accordance with justice and humanity.

At any rate, its provisions are no more drastic when applied in favor of the helpless children of the deceased, than when enforced for the benefit of a widow.

It seems now well settled that such acts are to be liberally construed in favor of the beneficiaries: *McFarland v. Oregon Elec. Ry. Co.*, 70 Or. 27 (138 Pac. 458, Ann. Cas. 1916B, 527); *McClagherty v. Rogue River Electric Co.*, 73 Or. 135, 155 (140 Pac. 64, 144 Pac. 569).

It seems to me that when the provisions of the law are read altogether, its plain purpose is to provide a recompense for both widow and children, and that this plain purpose ought to prevail over any narrow grammatical construction as to the use of "or" and "and."

I think, in construing this clause of the law, the word "and" should be understood rather than the word "or," and that it should be construed as giving to the widow and children each a compensation for his or her individual injury, to be taken equally and not by preference, and all to be recovered in one action, in which it seems all of those who are living should join.

This construction also seems to me, (1) more in harmony with our general inheritance statutes, which provide that upon the death of the husband or father, the widow and children shall each inherit some portion of his estate; (2) that it is a more reasonable conclusion

as to the real intent of the legislative mind; and (3) that it is the more humane and just construction of a doubtful and ambiguous provision, since it provides just compensation for the helpless children as well as the widow.

I think the judgment of the court below should be reversed and the case remanded for trial.

BEAN, J., concurs.

Motion to dismiss appeal submitted September 8, overruled conditionally September 10, 1918. Argued on the merits October 8, reversed and decree rendered December 16, 1919. Motion to modify decree allowed January 6, rehearing denied February 10, 1920.

BOEHMER v. SILVESTONE.

(174 Pac. 1176; 186 Pac. 26, 31.)

Appeal and Error—Right of Review—Inconsistent Act.

1. Act of plaintiff in suit for accounting by defendant as having wasted a trust fund, in obtaining an order for delivery to him of a life policy, which he had put up as security, *held*, not so inconsistent with his attitude on the trial as to defeat his appeal.

Appeal and Error—Decision Reviewable—Final Decree.

2. Decree dismissing, on the ground of a bequest to plaintiff being void, suit for accounting is final as regard his right of appeal, and not affected in that respect by his subsequently obtaining order permitting withdrawal from files a paper offered in evidence.

Appeal and Error—Serving and Filing Undertaking—Effect of Omission.

3. Failure to serve and file undertaking, one of the acts for perfecting appeal enumerated by Section 554, L. O. L., as amended by Laws of 1913, page 619, concluding: "And after compliance with the provisions hereof the appellate court shall have jurisdiction of the cause, but not otherwise," does not defeat appeal, but is an omission after notice of appeal, correction of which, under Section 550, subdivision 4, may be permitted.

Appeal and Error—Notice of Appeal—Service—Amendment of Return.

4. The court on appeal will permit amendment of the return on the notice of appeal to correctly state the facts as to service.

Appeal and Error—Transcript—Sufficiency.

5. The transcript on appeal is sufficient where, taking it and the abstract together, the court has before it everything necessary to enable it to pass on the case.

ON THE MERITS.**Trusts—Trustee Estopped from Denying Creation of Trust.**

6. Trustee, having accepted appointment as such and having received trust fund, will be estopped from questioning the creation of the trust, and from denying the right of beneficiary to the trust fund.

Trusts—Termination of Trust by Trustee.

7. If trustee for any reason deemed that the trust should be terminated and the money paid over to the beneficiary, the matter should have been presented by him to the court, and authority therefor obtained from the court.

Trusts—Trustee to Assume Validity of Trust.

8. A trustee must assume the validity of the trust under which he acts until it is actually impeached, though he may have some suspicion that there may have been fraud or collusion in the appointment or settlement.

Trusts—Trustee's Knowledge of Facts That Would Defeat Beneficiary's Title.

9. If a trustee obtains knowledge of facts that would defeat the title of the beneficiary and give it to another, he is not justified in communicating facts to the other person; his duty being to manage property for beneficiary, and not make admissions prejudicial to rights of beneficiary.

Trusts—Duty of Trustee to Use Ordinary Prudence.

10. A trustee must use such care for the safety of the trust fund as a man of ordinary prudence uses in his own business of a similar nature, and is held to a strict accountability for a faithful performance of the duties of his trust.

Trusts—Appropriation of Property by Trustee's Agent.

11. If a trustee employs an agent, and the agent appropriates the property intrusted to him, the trustee will be held responsible.

Trusts—Liability of Trustee for Trust Funds Deposited in Bank.

12. If money is deposited in the bank in such a manner that it is not under trustee's own exclusive control, as where money is deposited, so that it cannot be drawn without the concurrence of another person, it is at the peril of the trustee, and he is liable for any loss occasioned thereby.

Trusts—Investment of Trust Funds.

13. A trustee, who receives trust fund in cash, is required to invest funds in a manner that will be safe and yield a reasonable rate of return to beneficiary, and must follow direction and powers in instrument of trust, if any, as to time, manner, and kind of investment, or in absence of such directions and powers must be governed

by general rules of court or statutes, and by sound discretion and good faith.

Trusts—Trust Funds to be Invested in Safe Securities.

14. A trustee with cash funds to invest must not speculate, but make investments with a view to permanent investment, considering both probable income and probable safety of capital, and should invest in government or state securities, or other gilt-edged securities, or in bonds or mortgages on unencumbered real estate.

Wills—Reference to Other Will.

15. Where husband's will referred to will of deceased wife, and so described it as to leave no doubt as to its identity, and adopted provision therein with reference to certain trust fund, the provisions of both wills should be considered in relation to the trust fund.

Wills—Construction According to Testator's Intent.

16. Under Section 7347, L. O. L., testator's design governs, if it can reasonably be ascertained.

Trusts—Action for Accounting of Trust Fund may be Against Trustee and Third Person.

17. In suit for accounting of trust fund by beneficiary of trust, third person, to whom trustee lent money pursuant to plan entered into by trustee, beneficiary, and third person, whereby third person was to permit beneficiary to have money before termination of trust, was properly joined with trustee as defendants.

Trusts—Reasonableness of Attorney's Fees.

18. Where trustee made loan of \$5,000 trust fund, with the understanding that the borrower was to permit beneficiary to have money before termination of trust, attorney's fee of \$1,000, charged beneficiary by third person, to be paid out of the trust fund, held excessive; but, in view of considerable trouble caused third person by the indorsement of numerous checks by beneficiary, the third person will be allowed fee of \$150 for legal services.

Trusts—Compensation of Trustee.

19. Trustee will be compensated for services up to time that nearly all of the fund is expended, but not thereafter.

McBRIDE, C. J., Dissenting.

From Multnomah: JOHN P. KAVANAUGH, Judge.

On motion to dismiss appeal.

OVERRULED CONDITIONALLY.

Mr. Julius Silvestone and Mr. Seneca Fouts, for the motion.

Mr. L. H. Tarpley and Mr. E. E. Heckbert, contra.

McBRIDE, C. J.—This was a suit for an accounting, in which it was charged that defendant Julius Silvestone, being the trustee for plaintiff of a certain trust of \$5,000 bequeathed to him by his grandmother, had fraudulently conspired with defendant Fouts to waste, dissipate and misuse such fund, and praying for the removal of Silvestone as trustee; for a discovery of all the dealings of defendants with such fund; for an accounting by Silvestone, in which he should be required to pay the same into court; for the appointment of a new trustee, and for general equitable relief. The defendants, who are both attorneys at law, appeared separately and upon the trial a decree was rendered dismissing the case without prejudice.

The complaint, which is too lengthy to be reproduced here, charged in substance that Mary Boehmer, the grandmother of plaintiff, died in 1908, leaving a will whereby she bequeathed to Jacob Boehmer, plaintiff's grandfather, all her property, subject, however, to a trust in favor of plaintiff in the sum of \$5,000, which should be held in trust for plaintiff until he should arrive at the age of 30 years, and providing that in no event was he to receive the legacy until he had attained that age, and further providing that Jacob Boehmer should hold the interest of plaintiff during the lifetime of said Jacob Boehmer, and that after his death a trustee should be appointed to hold and manage such fund paying over the income of said property to plaintiff at stated periods; that Jacob Boehmer died in 1912, and that prior to June 20, 1913, the estates of both Jacob and Mary Boehmer were settled up and Julius Silvestone was appointed by the County Court trustee of said fund and took possession thereof. That after plaintiff had attained the age of

21 years and while he was still uninformed as to his exact interest in said estates, he went to the defendants who occupied offices together as attorneys at law, and inquired of Silvestone if there was any method by which he could obtain possession of the trust fund before attaining the age of 30 years; that Silvestone referred him to Fouts, who told him that for a fee of \$1,000 he could obtain the money, the scheme being that plaintiff should jointly with Fouts execute a note for \$5,000, payable in 1923 to Silvestone as trustee, and also a note to Fouts for \$4,000, payable in 1923, and should insure his life for the sum of \$5,000 in favor of Silvestone as trustee as security for the joint note, and that thereupon Silvestone should pay over the \$5,000 to Fouts, who in turn was to pay over \$4,000 to plaintiff. The complaint alleges the carrying out of such arrangement so far as the execution of the notes is concerned, but avers that plaintiff is not informed as to how much of said fund was paid over to Fouts, and charges that Fouts had paid over to him the sum of \$1,860 only, and charges further on information and belief that defendants have converted the balance of the fund to their own use.

The reasons given by the court for dismissing the suit without a decree upon the merits were that the bequest to plaintiff was void, and that if plaintiff had any remedy it must be in some other form of action.

Each defendant files a motion to dismiss the appeal. The reasons assigned by Silvestone are (1) that prior to the attempted appeal the plaintiff obtained an order of the court for the possession of the insurance policy held by Silvestone as collateral, which action it is claimed is inconsistent with his attitude as an appellant and a ratification of the transaction in which the insurance policy was delivered; (2) that the decree

appealed from is not a final order, but that the final order was the one made by the court, permitting plaintiff to withdraw the insurance policy from the files; (3) that no undertaking on appeal herein has been served upon defendant Fouts; (4) that the appellant has failed to file in this court any transcript or abstract within the time prescribed by statute for such filing; (5) that neither the transcript nor abstract as filed in the Circuit Court contains any statutory proof of service of the undertaking on appeal, upon the adverse party as required by the Code; (6) that no sufficient transcript on appeal has been filed herein, and (7) that no notice of appeal has been served upon any of the adverse parties, as prescribed by statute.

The defendant Fouts moves to dismiss for the reason that no service of the undertaking was made upon him. We will consider the motions in the order named, prefacing our observations with the remark that the privilege of an appeal to this court is one which the courts are loath to abridge or deny upon merely technical grounds, and with the added caution that no statement herein is to be construed as an intimation as to the merits of the charges made by plaintiff against the defendants. That question will properly arise when the case is heard upon the testimony with which at present we have nothing to do.

1. As to the first objection, we do not think the act of the plaintiff in asking that the insurance policy be delivered to him is so inconsistent with his attitude upon the trial as to defeat his appeal. The policy was a valid document in any event, and if plaintiff's contention in the suit was correct and the trust fund had been wasted, he might well contend that it should be returned to him. The defendants are placed in no worse position by the fact that he made the request and

secured the order permitting him to withdraw the policy, as it appears that he did not withdraw it, but on the contrary it is on the files and with the papers sent here, where it will remain to abide the event of the controversy.

2. The second objection that the decree of May 30, 1917, was not final cannot be sustained. That decree finally and fully settled, so far as the Circuit Court was concerned, the rights of the plaintiff in that suit, and the fact that after the decree the plaintiff obtained permission to withdraw from the files a paper offered in testimony in the case, could not change the status of the case.

3. The third objection argued by both defendants is that there was no service of a copy of the undertaking upon the defendant Fouts, and that therefore the appeal must fail. The defendants appeared separately throughout and were entitled to separate service of the undertaking. They occupied the same offices and there is no question as to the sufficiency of the service upon Silvestone, and merely a technical failure to serve upon his codefendant would not stop the appeal. It is settled by the case of *Dowell v. Bolt*, 45 Or. 89 (75 Pac. 714), that the failure to serve an undertaking is not an omission that will defeat the appeal, and that such service is not a jurisdictional requirement, but an omission that may be corrected in this court. Counsel for respondent ingeniously attempts to draw a distinction between Section 554 as it stood when the case of *Dowell v. Bolt* was decided, and the section as it stands since the amendment found at page 619, Laws of 1913. There is no actual difference in the meaning. Section 554, *supra*, after enumerating the various acts required in order to perfect an appeal, including the service and filing of the undertaking, concludes "And

thereafter the appellate court shall have jurisdiction of the case, but not otherwise." The amended section, after similar recitals, concludes with the words, "And *after compliance with the provisions hereof* the appellate court shall have jurisdiction of the cause and not otherwise." The meaning is exactly the same in both instances, and both should be read in connection with subdivision 4, Section 550, L. O. L., which is broad enough to permit the correction of any omission occurring by mistake, and not going to the jurisdiction where the appealing party is ready to correct it when brought to his notice.

4. The affidavit of Miss Masters is sufficient to show that due service of the notice of appeal was made upon defendant by leaving copies with a person in charge of the office in their absence. It is true that some of the statements in this affidavit are partly contradicted by the affidavit of the stenographer in charge of the office of Silvestone and Fouts, in which she denies that she was in the employ of Silvestone, but does not deny that she was in charge of his office. We are inclined to credit Miss Masters' statement as to what occurred upon the occasion of her visit to serve the notice of appeal and will permit the return to be amended as requested. The appellant will be permitted to serve a copy of the undertaking on defendant Fouts within ten days after this hearing under penalty of having his appeal dismissed for failure to do so.

Another objection is to the sufficiency of the transcript. Taking the transcript and the abstract together we have before us everything necessary to enable the court to pass upon the case, and the objections are without merit.

The motion to dismiss will be overruled, conditioned, however, upon the amendment of the return upon the

notice of appeal and the service of a copy of the undertaking upon the defendant Fouts, and a return of such service as indicated above.

OVERRULED CONDITIONALLY.

(Reversed and Decree Rendered December 16, 1919.)

ON THE MERITS.

(186 Pac. 26.)

Department 2.

This is a suit for an accounting by the defendants of a trust fund of \$5,000 left to the plaintiff, Robert Lee Boehmer, in trust by the last will and testament of his grandmother, Mary Boehmer, deceased, and by the last will and testament of his grandfather, Jacob Boehmer, deceased, and for the restoration of the trust estate. The plaintiff, Robert Lee Boehmer, is so named in the will of Mary Boehmer, and called Christian Armen Boehmer in the will of Jacob Boehmer. The trial court dismissed the complaint. Plaintiff appeals.

A general outline of the main facts necessary to an understanding of the case is here set forth. On January 5, 1908, Mary Boehmer, the grandmother of the plaintiff, died, leaving a last will and testament, which was duly admitted to probate in the County Court of Multnomah County on January 23, 1908. The provisions of this will, in so far as the same relates to the plaintiff, are as follows:

“First: I give and bequeath to my grandson, Robert Lee Boehmer (son of my deceased son Christian Boehmer) the sum of \$25.00. * *

“Fifth: Having lived in accord and happiness with my beloved husband, Jacob Boehmer, for more than forty years, and the property herein devised having been accumulated by our joint efforts, it is my will and I give, bequeath and devise all of the rest and residue

of my property of whatever kind and nature, whether real, personal or mixed, and wheresoever situated, of which I shall die seized or possessed (said property consisting principally of a quarter block on which I now reside at the Southwest corner of Everett and Tenth Streets of the City of Portland, Oregon, commonly known as Lots 5 and 8, in Block 70, of Couch's Addition to the City of Portland, Oregon) to my beloved husband, Jacob Boehmer, for his use and benefit with full power to handle, control, manage and contract regarding said quarter block as he may see fit and to dispose of, sell, mortgage, hypothecate, convey and transfer said quarter block or any part or parcel thereof, either in fee simple or otherwise, as he may see fit, and in fact to do with the same as he may see fit and without the necessity of the purchaser or mortgagee of said property seeing to the application of the proceeds thereof or any part thereof, excepting the application of the proceeds devised by the 7th clause of this my last will to my sister-in-law, Carrie Boehmer, with a limitation, however, that in case said quarter block shall not be sold during the lifetime of my said husband, or in case said quarter block shall be sold during the lifetime of my said husband and my said husband shall die being seized or possessed of money or property arising from the sale of said quarter block, then after the death of my husband, I give and bequeath to my said grandson, Robert Lee Boehmer, the sum of \$5000.00, which shall be a charge against the said money or property arising from the sale of said quarter block of which my said husband shall die seized or possessed, and if no proceeds remain from said sale of said quarter block made during the lifetime of my said husband, then said gift and bequest to my said grandson shall lapse and become of no effect.

"Sixth: It is my will that in no event shall my said grandson, Robert Lee Boehmer, come into possession of said bequest granted him by the fifth clause of this my will until he shall arrive at the age 30 years, and in case my said husband shall die before my said grandson shall arrive at the age of 30 years, I then nominate and appoint Maurice Costello, as trustee to take, hold

and handle any money that shall be coming to my said grandson under said 5th clause of my will until such time as my said grandson shall arrive at the age of 30 years, provided that the income or interest arising from any money coming to my said trustee's hand shall be paid to my said grandson or his lawful guardian from time to time in annual or shorter periods as may be convenient."

This will was executed January 13, 1908. On April 11, 1912, Jacob Boehmer died, leaving a last will and testament, which was duly probated in the County Court of Multnomah County, April 22, 1912. In this will, which was executed December 28, 1909, we find the following reference to the plaintiff:

"Third: I have not provided for my grandson, Christian Armen Boehmer, the son of my deceased son, Christian Boehmer, because he is amply provided for in the last Will and Testament of my deceased wife, by which \$5,000.00 is to be paid to my grandson if anything remained of his grandmother's estate after my death."

Maurice Costello, who was named as trustee of this fund in the will of Mary Boehmer, having died, L. H. Tarpley was appointed as trustee of the trust fund of \$5,000, the plaintiff then being nineteen years of age. Mr. Tarpley qualified as such trustee and the trust fund was turned over to him by the executor of the last will and testament of Jacob Boehmer deceased. On January 9, 1914, the plaintiff became twenty-one years of age. In November, 1914, Boehmer applied to Mr. Tarpley, his trustee, for an advance of \$200. This was refused for the reason that plaintiff had drawn all the interest that was due him and for the further reason that Mr. Tarpley believed plaintiff was squandering his money. Plaintiff says that soon thereafter he consulted the defendants, as attorneys, in order to find some way that he could have the \$200 advanced to him.

Thereupon the defendants prepared a notice to Mr. Tarpley requiring him to give an accounting of the \$5,000 trust fund. This notice was served on Mr. Tarpley by defendant Silvestone, whereupon Mr. Tarpley signified his willingness to be relieved as trustee. Plaintiff was informed of this and inquiry was made of him as to whom he desired appointed trustee. He mentioned his uncle who lived in Wasco, Oregon, and too far away from Portland to conveniently act. The defendant, Fouts, said to the plaintiff:

“How would you like to have this money right away or the biggest part of this money right away?”

Plaintiff informed him that he would like to have it. Mr. Fouts told him he thought he could so arrange the matter. He suggested it would be necessary for plaintiff to take out a life insurance policy in the sum of \$5,000. According to plaintiff's version of the matter it was deemed necessary to have a trustee appointed who would be willing to turn the money over. After talking with one man who would not accept the appointment as trustee upon such condition, on November 14, 1914, Mr. Tarpley having resigned as trustee, defendant Julius Silvestone was appointed trustee of this \$5,000 trust fund of Robert Lee Boehmer, by the Circuit Court of Multnomah County. He accepted the office and duly qualified, giving a bond for the faithful performance of the duties of said trust, and on November 16, 1914, received from the former trustee the \$5,000 in cash. Thereupon it was arranged for plaintiff to obtain an insurance policy in the Oregon Life Insurance Company for the sum of \$5,000, which he did. Plaintiff executed a note together with Mr. Fouts to Julius Silvestone in the sum of \$4,000 payable in 1923. Plaintiff also signed receipts in advance for the sum of \$400 per annum for each year's interest at 8

per cent upon the trust fund of \$5,000 up to 1923. Mr. Silvestone then paid Mr. Fouts \$4,000 for plaintiff. Mr. Fouts then informed the plaintiff that he had \$2,850 coming to him; that the insurance policy would cost a little over \$600; that there were some other expenses; that the agreed attorney's fee was \$1,000; that he would have to hold out the sum of \$1,000 as protection against any suit or action brought by any heirs in the event of such a case; that this \$1,000 could be paid to plaintiff at the end of one year; that he could turn over to plaintiff \$1,850. There was then paid to Boehmer by check \$1,843. Mr. Fouts retained \$515.35 to pay future insurance premiums. Mr. Fouts states that he was to receive a fee of \$1,000, which he retained; that out of this he was to pay Mr. Silvestone \$50 per annum for nine years, or \$450 for his services as trustee, leaving as his attorney fee \$550. The insurance policy was by assignment of plaintiff made payable to Julius Silvestone. Mr. Silvestone turned over to Mr. Fouts February 13, 1915, \$200 and March 16, 1915, \$800 and notes were executed to him by Fouts and Boehmer therefor. On various dates amounts ranging from \$5 to \$175 were paid to Boehmer, and at his request for his expenses and to satisfy claims against him, an account of which is stated in the brief of defendant Silvestone.

In May, 1916, Mr. Silvestone filed reports of his administration of the trust. He first reported that, with the approval of the *cestui que trust* and upon security which he deemed satisfactory, he loaned said fund to Seneca Fouts with interest at 8 per cent per annum; that plaintiff also signed the note; that the loan was further secured

“By obtaining from the borrower a policy of Life Insurance upon the life of the *cestui que trust* for

\$5,000.00 in an approved Life Insurance Company, loss made payable to the undersigned as Trustee in above matter.

"That the *cestui que trust* has received all the interest due upon the said fund, and the same remains in said condition at present."

In the second report it is shown that the fund and security therefor were in the same condition as when the first report was filed. The trustee further reported as follows:

"That the undersigned trustee herewith attaches copies of the receipts of the *cestui que trust* showing that the interest to date upon the trust fund has been received by him, the said copies being marked Exhibit 'A' and 'B' respectively, and made a part of the report."

Exhibit "A" is as follows:

"This certifies that I have received of J. Silvestone, Trustee, \$400.00 being interest for the year beginning November 16th, 1914, at the rate of eight (8%) per cent per annum on that certain trust fund of Five Thousand (\$5000.00) Dollars, of which trust fund said J. Silvestone is Trustee for my benefit and which I am to receive on January 9th, 1923.

"(Signed) ROBT. LEE BOEHMER."

Exhibit "B" is similar to exhibit "A," being for \$400 interest for the year beginning November 16, 1915.

The defendants are attorneys occupying a suite of offices together. They are not partners but are associated together in business and at the end of each month settle up the business that they have together and the office rent and expenses. The \$5,000 fund was deposited in a bank and checks drawn thereon signed by J. Silvestone, trustee, and countersigned by Seneca Fouts pursuant to an arrangement therefor.

Plaintiff testified as follows:

"Q. Now, at the time the \$1,850 check was given to you by Mr. Fouts did you have a further conversation with him in regard to the matter or with Mr. Silvestone?"

"A. Well, previous to getting this money when they give me this money Mr. Silvestone advised me to keep away from town, and not let anybody know that I had any money, because he said to keep quiet and not say nothing about it, and that I better leave town; go some place else outside of Portland. That was on the day previous to getting this money."

Mr. Silvestone testified to the effect that he was merely consulted by Mr. Fouts, who was attorney for Boehmer, in regard to the estate of Jacob Boehmer and in regard to the trust fund, and requested by Mr. Fouts to serve the demand upon Mr. Tarpley; that as nothing further was done in regard to the Jacob Boehmer estate, he did not consider himself as attorney for Robert Lee Boehmer in the matter of the trust fund; that he never received any pay for his services as attorney for Boehmer.

The Circuit Court found that no trust was created by the will of Mary Boehmer, and dismissed the complaint.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the names of *Mr. L. H. Tarpley*, *Mr. E. E. Heckbert* and *Mr. J. M. Haddock*, with an oral argument by *Mr. Haddock*.

For respondents there was a brief over the names of *Mr. Julius Silvestone* and *Mr. Seneca Fouts*, with an oral argument by *Mr. Silvestone*.

BEAN, J.—6. The defendant, Silvestone, having accepted the appointment as trustee of the \$5,000 fund of Robert Lee Boehmer and duly qualified as such trustee and received the fund from the former trustee, is,

as we view it, not in a position to question the creation of the trust or deny the right of the *cestui que trust* to the fund. Where a person has admitted the validity of a trust by seeking and securing from the court an appointment as trustee of said trust and recognizing the continuance of said trust by making to the court annual reports, as required by statute, the court has the right to enforce an accounting of the trust; and having filed reports showing that he was administering said trust, he is estopped to deny his trusteeship or his liability to account: *Roach's Estate*, 50 Or. 179 (92 Pac. 118); *In re Osburn's Estate*, 36 Or. 8 (58 Pac. 521); *Damouth v. Klock*, 29 Mich. 289; *Hughes v. Bent*, 118 Ky. 609 (81 S. W. 931); 39 Cyc., p. 293.

It is the position of the defendants, especially the defendant Silvestone, that as the money was paid over to Mr. Fouts upon the approval of the plaintiff, plaintiff is therefore estopped from questioning the same; that the money was loaned to Mr. Fouts upon his note also signed by the plaintiff, and that Mr. Fouts was responsible therefor.

7. By the taking of the receipts for the annual interest on the \$5,000 in advance for each year until 1923, and by the whole proceeding as delineated by the defendants, as well as by the testimony on behalf of the plaintiff, it clearly appears that the money was paid over to Mr. Fouts with the understanding that the same or a large part thereof, after deducting a claim for attorney's fees and other expenses, should be paid to Boehmer, the beneficiary, and thereby subvert the purposes of the trust. After the appointment by the court of Mr. Silvestone as trustee if for any reason he, as such trustee, deemed that the trust should be terminated and the money paid over to the beneficiary, the

matter should have been presented by him to the court and authority therefor obtained from the court.

8, 9. A trustee must assume the validity of the trust under which he acts until it is actually impeached. This is true even though he may have some suspicion that there may have been fraud or collusion in the appointment and settlement. Mr. Silvestone as such trustee cannot consistently with his duties say that no trust was created by the will of Mary Boehmer and that of Jacob Boehmer and thereby encourage or pave the way for other heirs or legatees to claim the bequest to the beneficiary. If a trustee obtains knowledge of facts that would defeat the title of the *cestui que trust* and give it to another he is not justified, in morals, in communicating facts to the other person. As further stated by the text-writer:

“His duty is to manage the property for his *cestui que trust*, and not to keep his conscience, or betray his title or interests; and he can make no admissions prejudicial to the rights of his *cestui que trust*, nor can he use his influence to defeat the purposes of the trust as declared by the creator of it”: 1 Perry on Trusts, § 433.

See, also, 39 Cyc., page 91, where we find the further statement that:

“Beneficiaries are also prohibited from claiming under the trust and at the same time asserting that it is invalid, and an application by them to have it set aside meets with no favor in a court of equity after ratification, or acquiescence and laches on their part.”

10-12. A trustee must use such care for the safety of the trust fund as a man of ordinary prudence uses in his own business of a similar nature. If a trustee employs an agent and the agent appropriates the property intrusted to him, the trustee will be held responsible: 1 Perry on Trusts, § 441. If money is deposited in the bank in such a manner that it is not under his

own exclusive control, as where money is deposited in a bank so that it cannot be drawn without the concurrence of another person, it is at the peril of the trustee and he is liable in case loss is occasioned thereby: 1 Perry on Trusts, § 443.

13, 14. When a trustee has secured the custody of the trust fund in cash, it is one of the most important of his duties to invest the same in such a manner that it will be safe and yield a reasonable rate of income to the *cestui que trust*. If there are directions in the instrument of trust as to the time, manner, and kind of investment, the trustee must follow the direction and power so given him. In the absence of such directions and powers, the trustee must be governed by the general rules of the court, or by the statutes and laws of the state in which the trust is to be executed. In the absence of such directions he must be governed by sound discretion and *good faith*. He must not have speculation in view but rather a permanent investment, considering both the probable income and the probable safety of the capital.

A trustee ought to invest in government or state securities, or other gilt-edged securities, or in bonds or mortgages on unencumbered real estate: 1 Perry on Trusts, § 452; *Roach's Estate*, 50 Or. 179, 197 (92 Pac. 118). "There is one rule," says Mr. Perry in his work on Trusts, Volume 1, Section 453, "that is universally applicable to investments by trustees, and that rule is, that trustees cannot invest trust moneys in personal securities. * * There must be express authority in the instrument of trust to authorize a loan on personal promises." In short, the law holds a trustee to a strict accountability and responsibility for a faithful performance of the duties of his trust. He cannot shift his responsibility to other persons: 39 Cyc., p. 304.

15, 16. The will of Jacob Boehmer referred to the will of his late wife, Mary Boehmer, and so described it as to leave no doubt as to its identity, and adopted the provision therein with reference to the \$5,000 trust fund. The provisions of both of these wills should be considered in relation to the trust fund: 40 Cyc. 1094; *Gerrish v. Gerrish*, 8 Or. 351 (34 Am. Rep. 585); *In re Willey's Estate*, 128 Cal. 1 (60 Pac. 471); *Dexter v. Harvard College*, 176 Mass. 192 (57 N. E. 371). Section 7347, L. O. L., commands that courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true interests and meaning of the testator in all matters brought before them. Where a testator's design can reasonably be ascertained it governs: *Shadden v. Hembree*, 17 Or. 14, 20 (18 Pac. 572); *Jasper v. Jasper*, 17 Or. 590, 593 (22 Pac. 152); *Portland Trust Co. v. Beatie*, 32 Or. 305, 309 (52 Pac. 89); *Kerr v. Duvall*, 62 Or. 470 (125 Pac. 830); *Kaser v. Kaser*, 68 Or. 153 (137 Pac. 187).

It is the contention of the defendants that as the plaintiff expressly approved of the disposition of the trust fund and he being *sui juris* is therefore estopped from questioning the same. In order for the beneficiary to be bound by his own consent or acquiescence the rule is stated in 1 Perry on Trusts, Section 467, thus:

"If trustees make an improper investment with the knowledge, assent, and acquiescence, or at the request of the *cestui que trust*, they cannot be held to make good the loss, if one happens; but the *cestuis que trust*, to be affected by such consent or acquiescence, must be *sui juris*, and capable of acting for themselves. * * *

17. It is clearly shown by the facts and circumstances of this case that Robert Lee Boehmer is an unsophisticated country lad, incapable of properly transacting his

own business. This is apparently the reason why provision was wisely made in the will of Mary Boehmer that he should not receive the bequest until he arrived at the age of thirty years. The defendant, Silvestone, having accepted the trust and received the fund of \$5,000 by virtue of an appointment by the court, should be required to account to the court, as such trustee. It is shown that Silvestone, the trustee, and the defendant, Fouts, acted together in the matter and they were properly joined as defendants in this suit.

Counsel for plaintiff concede in their brief that the trustee is entitled to credit for all sums that have been received by the plaintiff out of the trust fund, or expended for his benefit and with his consent. The trust fund of \$5,000 should be credited with the following amounts paid to and on account of plaintiff Boehmer at his request:

November 17, 1914, check Fouts to Boehmer. .	\$1,843
November 17, 1914, expenses of bond of trustee.....	180
November 17, 1914, 3 premiums on life insurance policy.....	240.25
November, 1914, paid J. Marsh to cancel note..	133
November, 1914, to Mrs. Kendricks for board, etc.....	61.90
November, 1914, T. B. McDevitt to cancel debt.....	175
November 16, 1914, to July 10, 1915, several small checks to plaintiff.....	265
December 16, 1915, Ed Dietrich.....	15
February 15, 1915, Shade one-third interest in patent.....	150
February 15, 1915, Mrs. Shade order of plaintiff.....	50

1915, making model and other expenses of patent.....	\$ 159.40
Paid bad checks indorsed by plaintiff:	
January 10, 1916, L. H. Tarpley.....	29.40
February 5, 1916, N. E. Lewis.....	15
February 2, 1916, C. Nern.....	45
1916, Fred Hussman.....	20
1916, A. H. Brown.....	70
February 14, 1916, paid Hutchman.....	10
Theodore Shade.....	5.75
J. Silvestone, services as trustee.....	100
Fouts, attorney's fee.....	150

Total credits.....\$3,717.70

Leaving a balance of.....\$1,282.30

—which defendants should pay to the clerk of the Circuit Court for the plaintiff, to be subject to the order of that court.

18. We do not believe that the plaintiff understandingly agreed to pay an attorney fee of \$1,000 in the matter of the fund or that in equity and good conscience he should be required to do so out of the trust fund. While there was no case in court, being only the appointment of a trustee, the plaintiff caused the attorney who acted for him considerable trouble in regard to the checks indorsed by him, and we think the amount allowed as attorney fees is a reasonable compensation for all of the legal services rendered plaintiff.

19. We do not find that the trustee acted willfully wrong in the matter and have therefore allowed for his services up to the time that nearly all of the fund was expended. Nothing should be allowed the trustee thereafter: See 39 Cyc. 480 et seq., and 2 Perry on Trusts, § 918, and notes.

The decree of the lower court will be reversed and one entered here in accordance with this opinion.

REVERSED. DECREE RENDERED.

DECREE MODIFIED ON MOTION. REHEARING DENIED.

BENNETT, J., and JOHNS, J., concur.

McBRIDE, C. J., dissents.

Allowed January 6, 1920.

MOTION TO MODIFY DECREE.

(186 Pac. 31.)

Motion of appellant to modify the decree.

ALLOWED.

Mr. L. H. Tarpley and Mr. J. M. Haddock, for the motion.

Mr. Julius Silvestone and Mr. Seneca Fouts, contra.

Department 2.

BEAN, J.—Our attention is called, by motion to modify the former opinion, to an item of \$20 which by error was credited among the items allowed the defendants in the account, which should be corrected. Attention is also called to items allowed defendants therein as follows:

“Fred Hussman \$20

“A. H. Brown..... 50”

—and that these two items had never been paid by defendant Fouts, and that there were some conditions attached to this defendant's agreement to pay the same for the plaintiff. Therefore these items will also be

deducted from the credits allowed defendants in the account, making a total of \$90. The amount to be deposited in the Circuit Court by defendants will be increased in a like amount of \$90, of which \$50 should be paid to A. H. Brown and \$20 to Fred Hussman, to cancel plaintiff's indebtedness to them upon a showing that the same has not been paid, and the obligation of defendant Fouts to pay the same annulled. In the event that it appears that said sums have been paid by defendant Fouts, then the same shall be credited or paid him for so liquidating the indebtedness of plaintiff.

The other matters to which our attention is directed by the motion were all fully considered at the time of rendering our former opinion.

With the modification above mentioned the former opinion is adhered to.

DECREE MODIFIED. REHEARING DENIED.

Argued December 4, 1919, reversed and remanded January 20, rehearing denied February 10, 1920.

UKASE INV. CO. v. PORTLAND.*

(186 Pac. 558.)

Eminent Domain—Raising Street Grade Constitutes No Additional Burden upon Surrounding Property.

1. A municipal council may raise the grade of a street, and such action constitutes the imposition of no additional burden upon surrounding property.

Municipal Corporations—Completion of Municipal Improvement According to Advertised Plan not Within Scope of Writ of Review.

2. In an action to recover assessments for a street improvement, whether the work was completed according to the advertised plan is

*Authorities passing on the question as to what use of street or highway constitutes an additional burden are collated in a note in 17 L. E. A. 474.

a question of fact, into which the Supreme Court cannot inquire on a writ of review; the official city declaration being conclusive.

Municipal Corporations—Local Improvement Assessments may be Repeated Until Property Benefited has Paid Just Proportion of Expense.

3. If a city has undertaken an improvement within the scope of its powers, and has actually accomplished it before an assessment therefor has been found to be irregular, the municipality may return again and again to the assessment until the property benefited is finally required to pay its just proportion of the expense.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

The plaintiffs, claiming to be the owners of property affected by a projected improvement of Holgate Street in the City of Portland initiated by the action of the city council, sued out a writ of review seeking to overturn an ordinance assessing upon their property the expense incurred in making the improvement. The principal basis of their plaint is that the record shows that the project was abandoned in large part and was never fully completed according to the original design advertised by the council when it first declared its intention to pave that thoroughfare. The Circuit Court sustained the writ and canceled the assessments. The city appeals.

REVERSED AND REMANDED.

For appellants there was a brief over the names of *Mr. Walter P. La Roche*, City Attorney, and *Mr. Lyman E. Latourette*, Deputy City Attorney, with an oral argument by *Mr. Latourette*.

For respondents there was a brief and an oral argument by *Mr. Frank S. Grant*.

BURNETT, J.—The argument for the plaintiffs is that the improvement projected originally by the city

contemplated the pavement of Holgate Street on the then established grade; that after the work was begun under contract which had been let to the lowest bidder, all without objection by the property holders, the council changed the plan respecting six blocks of the street, so as to construct a viaduct over ten tracks of the Southern Pacific Company of such a height as to make an overhead crossing, leaving the railroad traffic free to pass along its tracks unobstructed by street travel. The record shows that at a certain stage of the work, while it was yet uncompleted, the city council after having given due notice and there having been no objection to the same, raised the grade of Holgate Street and incidentally contracted with the railroad company to build a viaduct at its own expense and to pay \$1,000 of the amount required to condemn the use of adjacent property as footing for the necessary embankments whereon to construct the approaches to the viaduct, and that afterwards such use having been acquired by eminent domain, the city paid out of the general fund the amount required over the \$1,000 which was paid by the railroads. The original contractor for the improvement consented to the modification and laid the pavement over the grade thus raised, there being only slight and unimportant modifications in its width.

1. The record discloses that after the whole work had been completed, the city engineer filed with the council his certificate that it had been accomplished as modified by the contracts with the railroad company and the original contractor. Notice was given as required by the city laws, calling upon property owners interested to make objections to the approval of the engineer's report, declaring that the work had been completed substantially according to the original design. That the council could raise the grade of the

street and that the same constitutes no additional burden upon the property is doctrine established by *Brand v. Multnomah County*, 38 Or. 79 (60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L. R. A. 389). In the absence of any showing that the expense to the property holders was increased by the change of the grade and the laying of the pavement upon the new grade, there can be no just cause of complaint.

2. Whether the work was indeed completed according to the advertised plan or not, is a question of fact into which we cannot inquire on a writ of review. We are bound by the official city declaration that it has been so finished. The matter has so recently been considered in the practically parallel case of *Killingsworth v. City of Portland*, 93 Or. 525 (184 Pac. 248), in an opinion by Mr. Justice BENNETT, that a rehearsal of the precedents and reasoning is unnecessary at this time. The subject is also discussed in *Phipps v. Medford*, 81 Or. 119 (156 Pac. 787, 158 Pac. 666).

3. Under the modern charters mentioned in those cases, the principle seems to be that if the city has undertaken an improvement within the scope of its powers and it has actually been accomplished even in a modified form and the assessment therefor has been found to be irregular, the municipality may return again and again to the assessment until the property benefited is finally required to pay its just proportion of the expense. We may well consider that if any fraud on the part of the city or its officers could be shown, equity would interpose to relieve the imposition upon the property holders. But, given a fair exercise of the charter powers of the city, affected as it is not only by the administrative but by the legislative function, the municipality may pursue the subject until a just amount to be collected for the improvement is

secured, remembering always that at some stage of the process the taxpayer has a right to be heard on the question of whether or not he is charged with his legitimate share of the tax.

Bringing before us, as it does, only the questions of law apparent on the face of the record, excluding from our consideration all issues of fact, we are compelled by the precedents noted to say that there is no irregularity disclosed in the record. The judgment of the Circuit Court is reversed and the cause remanded with directions to dismiss the writ.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued September 23, affirmed November 12, 1919, modified as to costs and rehearing denied February 10, 1920.

HODLER v. HODLER.*

(185 Pac. 241; 187 Pac. 604.)

Contracts—Contract for Divorce.

1. Where husband and wife made property agreements "in anticipation of a divorce about to be procured," and where husband facilitated trial of wife's divorce suit by making trip for special purpose of being served, did not appear in suit, and permitted wife to obtain divorce on grounds which he knew to be false, the transaction held an agreement by which wife should procure divorce, and as such void as against public policy.

[As to the validity of contracts intended to facilitate procuring divorce, see notes in 11 *Ann. Cas.* 377; *Ann. Cas.* 1915A, 811; *Ann. Cas.* 1918E, 902.]

*For authorities discussing the question of validity of anticipatory contract making provision for wife in the event of her obtaining a divorce for subsequent fault of husband, see notes in 23 *L. R. A. (N. S.)* 880, and *L. R. A.* 1918A, 384.

On validity of contract upon condition, or in consideration of procuring divorce, see note in 44 *L. R. A. (N. S.)* 379. **REPORTER.**

Pleading — Admissions — Cancellation of Note Executed Pursuant to Collusive Agreement.

2. In divorced wife's action to cancel her note and mortgage to husband upon ground that they were void and without consideration, because executed pursuant to collusive divorce agreement, husband, after asserting validity of agreement and after alleging that in reliance thereon he did not appear or defend divorce suit though he had a valid defense, cannot question court's jurisdiction to render decree of cancellation upon ground that parties are *in pari delicto*.

Contracts—Return of Money Paid Under Collusive Agreement.

3. Court, in canceling divorced wife's note and mortgage to husband on ground that they were executed pursuant to collusive divorce agreement, will not decree return of money actually paid thereon; the contract, as to money paid over, being an executed contract, and wife being without a remedy in regard thereto.

Cancellation of Instruments—Collusive Divorce Agreement—Cancellation of Note and Mortgage.

4. In divorced wife's suit to have note and mortgage to husband canceled upon ground that they were void and without consideration because executed pursuant to collusive divorce agreement, wife held entitled to cancellation as against objection that, if note and mortgage were against public policy, no relief should be granted, since wife could successfully defend in suit to foreclose mortgage upon ground that it was void and without consideration.

ON PETITION FOR REHEARING.**Equity—Jurisdiction Dependent on Facts Existing at Time of Complaint.**

5. Jurisdiction of equity must depend on the actual facts as they exist at the time the complaint was filed and the relief which is sought to be obtained by both the plaintiff and the defendant as evidenced by the pleadings.

Cancellation of Instruments—Party to Void Note and Mortgage Though in *Pari Delicto*, may Sue to Cancel Obligation Before Maturity.

6. Conceding that parties to an agreement, void because a collusive divorce agreement, were *in pari delicto*, equity has jurisdiction to cancel note and mortgage, given pursuant thereto, when suit is brought before the maturity of the obligation; the maker of the note not being sufficiently protected by defense which she might make on the note and mortgage if they were sued on by an innocent purchaser for value.

Costs—Of Transcript Properly Divided Where Plaintiff had Benefit of Transcript Filed by Defendant.

7. Where both parties appealed, and plaintiff had the benefit of the transcript filed by defendant, the costs of the transcript would be divided.

From Multnomah: GEORGE W. STAPLETON, Judge.

In Banc.

The plaintiff and the defendant Louis Hodler were intermarried in 1898 and lived together as husband and wife until about January 1, 1915. They have two sons, one about sixteen years old and the other about eleven.

In 1903 the plaintiff inherited from her mother 187.5 acres of land near Beaverton in Washington County, Oregon, together with some property in the City of Portland and about \$25,000 in money. The plaintiff alleges that although the defendant Hodler was a strong, healthy man, after she received this legacy he led a life of ease and idleness and was fed and clothed out of the income from her property; that he manifested toward her a cruel, overbearing and vicious disposition and insisted upon managing her property, collecting the rents and controlling the expenditures.

The complaint narrates that prior to 1914 the Hodlers became acquainted with A. B. F. Orr; that after the death of Orr's wife Hodler agreed with Orr that the latter should become a boarder in the Hodler household; that Orr invited the plaintiff and her husband to take a trip east with him, which they did at his expense; that upon their return the plaintiff informed Orr that she did not want him to remain in her home, but Hodler insisted that he should continue to reside there. The plaintiff avers that some time in the summer of 1914 she first learned that Hodler had a child in the east, by a former marriage, and at that time Hodler's cruel treatment of her became aggravated; that he accused her of prying into his affairs and insisted that she should pay him \$40,000, threatening that he would not leave without a settlement; that he told the children their mother was unchaste and had been guilty of immoral relations with Orr on the trip; that as a re-

sult of his treatment and such charges the plaintiff became almost a wreck, mentally and physically, and in the fall of 1914 she asked Hodler to leave her house, where he had been living, and that he refused to go and schemed to compel her to pay him at least \$20,000, with threats that unless she did so he would publish in the "Morning Oregonian" a statement of her alleged meretricious conduct.

It is further stated in the complaint that upon the failure of Hodler to leave, the plaintiff left her own home; that through duress, on account of her children and to save her good name she agreed to pay Hodler \$20,000; that pursuant to such agreement the parties met at the office of Attorney MacMahon in Portland on January 8, 1915, and entered into the following contract:

"This agreement, made and entered into this eighth day of January, 1915, by and between Mr. Louis Hodler and Mrs. Delia Hodler, at present husband and wife, both of the State of Oregon, witnesseth:

"That whereas the parties hereto are the owners in fee simple of realty situate in the County of Washington, State of Oregon, and in the County of Multnomah, State of Oregon, and also personalty;

"And whereas, certain estrangements have arisen between them and disagreements during the past years which appear to be inevitable and irreconcilable;

"And whereas, they have not for many years lived together as husband and wife, and are not now living in said marital relations;

"And whereas, there have been born to the parties hereto two minor male children, Albert, of the age of 16 years, and Joseph, of the age of 13 years, both now under the care and custody of the parties hereto;

"And whereas, it is desired by the parties hereto that they should save the cost of litigation and the expense incurred by anticipated litigation in the division

of said property for the benefit of their said minor children as well as for their own benefit;

"Therefore, in anticipation of a divorce about to be procured by one of the parties hereto on the merits to be set forth in said complaint, upon which this agreement has no bearing whatever, now, therefore, we, the said Louis Hodler and the said Delia Hodler hereby agree to divide our property and to settle our property rights completely in the following manner, to wit:

"First: Mrs. Delia Hodler hereby agrees to sign, set over and deliver to said Louis Hodler a certain promissory note and mortgage properly secured on property situate in the city of Portland, State of Oregon, in the sum of three thousand dollars (\$3,000.00) executed by Joseph J. Tierney to said Delia Hodler;

"Second: Said Delia Hodler further agrees that when these papers are taken from escrow to pay to said Louis Hodler the sum of one thousand dollars (\$1,000.00) in gold coin of the United States of America;

"Third: Mrs. Delia Hodler further agrees that upon the delivery of said papers to make, execute and deliver to said Louis Hodler her certain promissory note, secured by a mortgage payable on or before three years from date hereof, drawing interest at the rate of seven (7%) per cent per annum, said note to be secured by a mortgage upon her property consisting of one hundred and eighty-seven and one half (187½A.) acres formerly owned by Patrick Forrester, situate in the Lassen Donation Land Claim in the County of Washington, State of Oregon; interest on said mortgage to be paid annually; said note and mortgage to be made in the sum of sixteen thousand dollars (\$16,000.00);

"In consideration of the foregoing gifts and mortgage notes and moneys above set forth, said Louis Hodler hereby agrees that when these papers are taken from escrow, to make, execute and deliver in return for said twenty thousand dollars (\$20,000.00) aforementioned, his quitclaim deeds to all property owned by the said Mrs. Delia Hodler and said Louis Hodler

in the County of Washington, State of Oregon, and also in the County of Multnomah, State of Oregon;

"And it is hereby agreed by and between the parties hereto that this agreement shall be final and shall be a complete settlement of all their property rights owned by and between the parties hereto;

"And it is further agreed that these papers shall be executed in duplicate and the same shall be placed in escrow in the bank of Ladd & Tilton in the city of Portland, Oregon, signed by the parties hereto, and that said escrow shall not be removed from said bank without the consent of Delia Hodler, Louis Hodler and their attorney, M. J. MacMahon, ensemble; that is, when the three aforementioned persons appear at the bank and ask for them together;

"It is further agreed by and between the parties hereto and thoroughly understood that after the decree of divorce shall have been entered between the parties hereto dissolving forever the bonds of matrimony existing between them, that the execution of said deeds and the payment of said money and the execution of said mortgage note shall be executed and delivered to the respective parties hereto within a reasonable time after the entrance of said decree of divorce, to wit, five or ten days.

"This agreement is made, executed and placed in escrow by and between the parties hereto in duplicate on this eighth day of January, 1915.

"LOUIS HODLER.

"DELIA HODLER.

"Witnesses:

"M. J. MACMAHON.

"L. B. HAGUE."

On January 30th next the foregoing agreement was modified as follows:

"Know all men by these presents: That whereas heretofore, on January 8, 1915, the parties hereto, Mr. Louis Hodler and Delia Hodler, entered into an agreement regarding the division of their property, and whereas said agreement has been placed in escrow in

Ladd & Tilton Bank, Portland, Oregon, and whereas said agreement recites that the parties have not for 'many years' lived together as husband and wife, and whereas Louis Hodler makes objection to the statement that they have not lived together 'many years' and whereas the estrangement mentioned in said agreement has existed for a period of a little over one year prior to January 8, 1915; it is therefore agreed that said statement of facts in said agreement be, and the same is hereby corrected and amended, so that the sentence reciting said facts shall read as follows: 'and whereas they have not for a year last past lived together as husband and wife, and are not now living in said marital relation.'

"It is further agreed between the parties hereto that the said Delia Hodler shall, at her own cost and expense, suitably support and educate and maintain the two minor children of the parties hereto during the minority of such children and during the minority of the younger thereof. It is further agreed that the said Delia Hodler will protect and save harmless the said Louis Hodler from any liability arising out of and because of the signing of any notes or other evidence of indebtedness by the said Louis Hodler, in connection with the purchase of any real estate now standing in the name of the said Delia Hodler.

"In witness whereof, parties have hereunto set their hands this 30th day of January, 1915.

"DELIA HODLER.

"LOUIS HODLER.

"Witnesses:

"M. J. MACMAHON.

"FRANK SCHLEGEL."

Pursuant to the original agreement, the plaintiff commenced a suit for divorce against the defendant Louis Hodler in the Circuit Court of Clatsop County, on the ground of cruel and inhuman treatment. A copy of the complaint and summons was duly served on the defendant in Multnomah County. Thereafter

Attorney MacMahon drafted a letter to the sheriff of Clatsop County and gave it to Hodler, who personally delivered it to that officer, by whom he was again served with another copy of the summons and complaint in that county. The defendant did not appear in the divorce suit. After a default was taken a reference was made and the testimony in the Clatsop County suit was taken by the court reporter of that county, in the office of Attorney MacMahon in Portland. The plaintiff and Clara Wenger, a niece of the defendant Hodler, gave strong evidence of facts and circumstances tending to prove the allegations of the complaint, to the effect that the plaintiff had a just ground of complaint against the defendant upon the charge of cruel and inhuman treatment. Based thereon a decree of divorce was rendered by the Circuit Court of Clatsop County in favor of the plaintiff as prayed for in her complaint.

After the decree was entered, pursuant to the escrow agreement the parties met and with Attorney MacMahon went to the Portland bank, where \$1,000 in cash was actually paid over to Hodler and an assignment of the Tierney note and mortgage for \$3,000 was duly made to him by the plaintiff. She then executed in his favor her promissory note for \$16,000 dated February 1, 1915, payable on or before three years from date, with interest at 7 per cent per annum, together with a mortgage upon the 187.5 acre tract of land to secure the payment thereof. Soon afterward Hodler indorsed the \$16,000 note and mortgage and assigned them to the defendant Eliza Stone, to whom the plaintiff made certain payments of interest thereon during the first year after execution, to the amount of \$1,120. The Tierney note was collected and the proceeds thereof, together with the \$1,000 cash, were turned over to the

defendant Elizabeth Wenger by the defendant Louis Hodler. The complaint states that there was no consideration for the assignment of the \$16,000 note and mortgage to the defendant Eliza Stone, but that at the time the plaintiff made her payments of interest thereon she did not have any knowledge of that fact and assumed that the defendant Stone was the owner and holder thereof for value. It is also alleged that the defendant Elizabeth Wenger now holds the \$1,000 and the proceeds of the Tierney note and mortgage in trust for the use and benefit of the defendant Louis Hodler, who is the owner thereof.

The plaintiff contends that the \$4,000 evidenced by the cash payment, the Tierney note and mortgage, and the \$16,000 note and mortgage were wrongfully and unlawfully obtained from her by duress, under threats as stated and by means of cruel and inhuman treatment, and that the whole transaction is void and without consideration. She avers that after the money, notes and mortgages were obtained the defendant Hodler commenced an action against Orr for alienation of the affections of his former wife, the plaintiff Delia Hodler, in which he made the threatened charges and caused them to be published.

It is further alleged that at the time the plaintiff and this defendant were married Hodler had a wife and child whom he had deserted in the east, and he had never been divorced from that wife.

There are three separate causes of suit and the plaintiff asks for a decree rescinding the original agreement and the modification thereof; that the \$16,000 note and mortgage be canceled; that the defendant Hodler be required to return the \$4,000, which he received, and that the defendant Stone be ordered to return the \$1,120.00 paid her as interest by the plaintiff.

For answer Louis Hodler admits that he and the plaintiff were intermarried in 1898, and lived together as husband and wife until January 30, 1915; that on January 10, 1915, plaintiff instituted a suit for divorce against him in Clatsop County, Oregon, and that on January 30, 1915, the court rendered a decree of divorce in favor of plaintiff. He admits the execution of the contracts and affirmatively alleges that the plaintiff was not acting under any duress, undue influence, fraud or deceit of the defendant; that she was acting upon her own volition, and under the advice of her attorney; that she realized and understood that the agreements provided for a full settlement and division of the property and property rights between herself and this defendant to avoid litigation of such property rights, and the divorce proceedings; and that Frank Schlegel, who is now one of the attorneys for the plaintiff in this suit, appeared for and represented this defendant in the consummation of the agreements and the execution of the mortgage. He also admits that he did not appear in the divorce suit in Clatsop County; that in February, 1915, he filed a suit in Multnomah County, Oregon, against Orr for the alienation of plaintiff's affections, and that in February, 1917, he instituted another suit for the same purpose at Vancouver, in the State of Washington.

This defendant further admits that he assigned the note and mortgage to the defendant Eliza Stone, his ownership thereof, and the payment of \$1,120 thereon as interest.

The answer admits that Louis Hodler was legally married to Emma Roe on October 1, 1885, in Jones County in the State of Iowa, and that a daughter was born as the issue of such marriage. It is affirmatively alleged that on November 21, 1888, his then wife, Emma

Hodler, was duly and legally divorced from him by a valid decree rendered in a suit in which she was plaintiff in the State of Iowa; that on January 13, 1896, he instituted a suit for divorce in the Circuit Court of the State of Oregon for Yamhill County against the said Emma Hodler; that findings of fact and conclusions of law were rendered therein and that based thereon, a decree of divorce was rendered in his favor against Emma Hodler.

Louis Hodler contends that the contracts between the plaintiff and himself were duly and legally carried out and acquiesced in by both parties until this suit was commenced, and that he has at all times and in all respects complied with and performed his part of the contracts, which he claims were fair and reasonable. He admits the execution of the supplemental agreement of January 30, 1915, and alleges that the notes and mortgage were executed pursuant to the terms of that contract and were founded upon a sufficient consideration, but denies all other material allegations.

As an affirmative defense, it is alleged that Louis Hodler frequently protested to the plaintiff against the presence of Orr in the family home, demanding that he should leave, and many times ordering him away, but that the plaintiff insisted that Orr should remain, and that Orr did remain until a short time before the divorce of plaintiff and defendant. He then alleges certain conduct between Orr and the plaintiff which led to the estrangement of plaintiff and defendant, and that the plaintiff determined to secure a separation from this defendant although it was against his wish and protest.

Hodler avers that on account of her relations and conduct with Orr, the plaintiff lost her love and respect for the defendant; their domestic affairs became

strained, and it was impossible for them any longer to live together as husband and wife; that by reason thereof, a division of property and property rights became necessary and to settle and adjust such rights so that a divorce suit could be instituted and prosecuted without the necessity of litigating property rights, she proposed a final settlement of such property rights; that pursuant thereto the agreement marked "Exhibit 'A'" was executed, which was thereafter modified by the supplemental agreement known as "Exhibit 'B'"; and that on January 30, 1915, the plaintiff secured the divorce in question.

The defendant Hodler further alleges that the conduct of plaintiff and Orr caused him humiliation and disgrace, and afforded him sufficient grounds to institute and maintain a suit for divorce against the plaintiff, specifically alleging such grounds. He also alleges that after plaintiff demanded a separation and division of the property, and after he had been advised by her that they could not live together any longer, he went to the office of her attorney where the contracts were drawn, and employed Frank Schlegel, now one of the attorneys for plaintiff, "to look over the agreements and protect his interests therein, and paid him a fee of \$100 for said services." The answer further alleges:

"That at the time of the execution of said agreement, immediate divorce proceedings were contemplated by these parties and that thereafter, to wit, upon the tenth day of January, 1915, this plaintiff, then a resident of Multnomah County, Oregon, filed and instituted in the Circuit Court of the State of Oregon, for Clatsop County, a suit for divorce against this defendant and that thereafter, to wit, on January 30, 1915, the court heard evidence in said case and filed his findings of fact

and conclusions of law and entered a decree therein divorcing this plaintiff and this defendant."

In the divorce suit, according to the defendant, it was understood that all property rights had been settled out of court,

"and this defendant entered no appearance therein and believed that the agreements hereinbefore referred to in reference to the division of the property and the property rights were valid, binding and conclusive. * * "

Upon the execution of the documents and contracts they were placed in escrow in a Portland bank, where they remained until the divorce decree was rendered, after which they were delivered to the respective parties.

It is further alleged:

"That the actions and associations between this plaintiff and the said Orr afforded abundant grounds for a decree of divorce in favor of the defendant and that at that time the plaintiff was possessed of property real and personal in her own right of the probable value of \$75,000.

"That this defendant entered no appearance in said suit and allowed a default to be taken against him relying and believing that the agreements hereinbefore referred to in reference to the division of the property and the settlement of the property rights were valid, binding and conclusive and could and would never be assailed by this plaintiff but that she would in all respects abide by, live up to and conform to the terms of said contracts.

"That if he had any reason to believe or did believe or suspicion that said agreements marked Exhibits 'A' and 'B' were not final and conclusive and were not, in fact, a complete and final settlement of all property and property rights between plaintiff and the defendant, he would have appeared and filed an answer in said divorce suit and filed a cross-complaint alleging

grounds hereinbefore mentioned and others for the purpose of securing a divorce, for the purpose of adjusting the property rights and for the purpose of securing the advantage of any property rights authorized under the laws of the State of Oregon."

Facts are then alleged tending to show that the plaintiff accepted and ratified the terms and conditions of such contract and undertook in good faith to carry them out; that for more than two years she has recognized them as valid and binding, and has not placed or offered to place the defendant *in statu quo*.

Further, the defendant alleges the commencement of the divorce suit in Clatsop County, and the rendering of decree therein, and prays for a decree:

"That the contracts and mortgages hereinabove alleged and alleged in plaintiff's complaint be held and decreed to be valid and binding and that this suit be dismissed and that this defendant recover his costs and disbursements in this suit from this plaintiff and for such other and further relief as may appear to the court to be equitable in the premises."

Answers were filed by the defendants Eliza Stone and Elizabeth Wenger denying all material allegations of the complaint.

The plaintiff replied, denying all the new matter alleged in defendant Hodler's further and separate answer, and alleging certain other matters by way of defense. All the testimony was taken in open court before the judge, who made exhaustive findings of fact and conclusions of law, upon which he rendered a decree setting aside as null and void the \$16,000 note and mortgage, and the assignment thereof, refusing the plaintiff a decree for the money which she had already paid under the contracts, and ordering that each party should pay his or her own costs.

The plaintiff appealed, claiming that she was entitled to a decree for the \$5,120 which she had actually paid, and the defendant Hodler appealed on the ground that the court erred in refusing to quash the service of summons; that his demurrer to the complaint should have been sustained; that the suit was not commenced within the time limited by the Code; that the complaint does not state facts sufficient to constitute a cause of suit; that it appears that the plaintiff has ratified the contracts, note and mortgage and waived the alleged duress, and that the court did not have jurisdiction of the subject matter of the suit; that it erred in refusing to decree that the \$16,000 note and mortgage were valid and binding and that plaintiff ought to be estopped from claiming or asserting that the contracts were executed under duress or were void; and that the plaintiff should have no decree whatever. **AFFIRMED.**

For appellant there was a brief with oral arguments by *Mr. Thomas Mannix*, *Mr. Guy L. Wallace* and *Mr. Frank Schlegel*.

For cross-appellant there was a brief with oral arguments by *Mr. E. B. Tongue* and *Mr. Thomas H. Tongue*.

JOHNS, J.—This has been a bitterly contested suit, and the record is full of crimination and recrimination, but as we read it neither of the Hodlers could qualify to cast the first stone. The defendant admits that he was married in Jones County, Iowa, to Emma Roe on October 1, 1885; that they lived there as husband and wife, and that a daughter was born to them; that in about one year he left his family and came to Beaverton, Washington County, in this state, and that he has never since seen that wife and child. He alleges that

Emma Roe Hodler obtained a divorce from him in Iowa on November 21, 1888, and it appears that soon thereafter she married his brother. He also alleges that on January 13, 1896, he instituted a suit for divorce against her in the Circuit Court of the State of Oregon for Yamhill County, in which findings of fact were made and a decree was rendered in that court on April 14, 1896, divorcing him from his former wife, Emma Hodler.

The plaintiff and the defendant Louis Hodler were married at Vancouver, Washington, in 1898. At that time Hodler claims that she knew and plaintiff denies that she had any knowledge of his former marriage, or that he had a daughter. It is significant that while he was then a resident of Beaverton in Washington County he filed his complaint and obtained his divorce in Yamhill County.

At the time of their marriage, the plaintiff and defendant were without substantial means, and both were hard-working people and made their home in the country. In 1903, through her mother, the plaintiff became the exclusive owner of the Washington County farm of 187.5 acres, together with some property in Portland, Oregon, and a substantial amount of money known as the "Pat. Forester estate," and in a short time they both moved to Portland, where they continued to reside. Up to 1913, their domestic relations were fairly pleasant and they were reasonably happy.

Upon the death of his wife, A. B. F. Orr became a boarder in the Hodler household, and invited the husband and wife to take an eastern trip which it was understood would be at his expense. It was upon that trip that their domestic trouble commenced, with Orr as the storm center. On their return, he continued to reside with them and their domestic troubles increased

from time to time until they finally culminated in the execution of the agreements and the filing of the divorce suit in Clatsop County by the plaintiff upon the grounds of cruel and inhuman treatment. The plaintiff vigorously contends that she did not want Orr in the home, and frequently notified him to leave, but that her husband objected to his leaving and insisted that he should stay. The defendant as vigorously contends that he did not want Orr around the house and several times notified him to leave, and that his wife insisted that he should remain. In either event it is apparent that Orr was largely responsible for the domestic trouble between the Hodlers. By mutual consent, the plaintiff and the defendant Louis Hodler together went to the office of Attorney MacMahon in the City of Portland, where the agreement known as "Exhibit 'A'" was prepared and executed on January 8, 1915. Following the execution of that agreement, the plaintiff went to Astoria in Clatsop County and filed her complaint in the divorce suit. The complaint and summons were first served upon Louis Hodler by the sheriff of Multnomah County, following which Attorney MacMahon drafted a letter to the sheriff of Clatsop County, which he delivered to Louis Hodler, who was then in Portland, and who personally went to Astoria and delivered the MacMahon letter to the sheriff of Clatsop County, by whom Louis Hodler was again duly served in the office of that sheriff with another copy of the complaint and summons in the divorce suit.

Hodler did not appear in the divorce suit and a default was entered against him. It is apparent that his purpose in going to Astoria and the making of the second service was to facilitate the trial of the case and the obtaining of the decree of divorce.

After the default was taken, both parties returned to Portland where the testimony was taken in MacMahon's office before the reporter of the Circuit Court of Clatsop County as referee, with the plaintiff and Clara Wenger, a niece of the defendant, as the only witnesses, and each of them gave strong testimony tending to show that the defendant had committed numerous acts of cruel and inhuman treatment towards plaintiff and that she had been a dutiful and faithful wife. Based thereon, the Circuit Court of Clatsop County, rendered a decree in favor of the plaintiff. After its rendition and by mutual consent, the plaintiff and defendant with Attorney MacMahon went to the bank where the papers were placed in escrow pending the suit, and the deeds from the defendant to the plaintiff were duly executed and delivered, and plaintiff then paid the defendant \$1,000 in cash and assigned the Tierney note and mortgage of \$3,000, and executed the \$16,000 note with a mortgage on the Washington County land to secure its payment, all of which were delivered to the defendant, and the whole transaction was apparently closed until about the time this suit was commenced. At its maturity, the plaintiff was notified by the attorney for Mrs. Stone to pay the annual interest of \$1,120 on the \$16,000 note. After some delay, the plaintiff paid that interest to Mrs. Stone under the alleged belief that she was the actual owner and holder of that note and mortgage. But it is admitted in the pleadings and appears from the evidence that the defendant Louis Hodler was then and is now the true owner and that Mrs. Stone held the assignment thereof in trust for him.

While we agree with the trial court that there is much perjured testimony in the record, there is no dispute as to the execution of any of the instruments or why

they were executed, or as to the obtaining of the divorce, the grounds and the reason for it or the manner in which it was obtained. Hodler claims that the contract of January 8, 1915, as modified by the parties on January 30th of that year, was a separation agreement only, and as such was valid. The plaintiff now contends that it was procured by duress, was conditioned on the obtaining of the divorce, was intended to promote and facilitate the divorce and is void as against public policy. That is the vital question in this case. In 9 R. C. L., page 252, it is said:

“Marriage is a relation in which the public is deeply interested and is subject to proper regulation and control by the state or sovereignty in which it is assumed or exists. The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation.”

1. Under the earlier decisions even separation agreements between husband and wife were held to be void as against public policy, but under the modern decisions, when fair and reasonable such agreements are now sustained. As we analyze it, the whole transaction between the plaintiff and Louis Hodler was an agreement between them by which the plaintiff should procure a divorce.

The defendant Hodler alleges in his answer that “at the time of the execution of said agreement immediate divorce proceedings were contemplated by these parties,” and the divorce suit was filed on January 10, 1915. To facilitate the trial Louis Hodler went from Portland to the sheriff's office at Astoria for the express purpose of being served with a copy of the summons and complaint in Clatsop County, and did not enter any appearance in the suit. His own niece, who

for a number of years had lived with the litigants in their family home, was an important witness for the plaintiff and testified as to specific acts of cruel and inhuman treatment of the plaintiff by the defendant Hodler, on the strength of which the decree was granted. This defendant further alleges that he "entered no appearance therein and believed that the agreements hereinbefore referred to in reference to the division of the property and the property rights were valid, binding and conclusive," and that if he had "had any reason to believe or did believe or suspicion that said agreements, 'Exhibits "A" and "B," were not final and conclusive and were not in fact a final settlement of property and property rights between plaintiff and the defendant, he would have appeared and filed an answer in said divorce suit and filed a cross-complaint alleging grounds hereinbefore mentioned, and others, for the purpose of securing a divorce." The statement as to "grounds hereinbefore mentioned" has reference to the alleged adulterous acts and meretricious conduct between the plaintiff and Orr, and the alleged cruel and inhuman treatment of the defendant by the plaintiff. Hodler now contends and it appears from his own evidence in this suit that he was a kind, faithful and loving husband, and that he never abused or mistreated the plaintiff. He declares that she never had any grounds for a divorce on account of cruel and inhuman treatment or otherwise, and his niece testifies in the pending case that she committed perjury in all her testimony in the divorce suit as to the grounds upon which the decree was obtained. In other words, assuming that the evidence and contentions of the defendant in the pending case are true, the plaintiff never had any ground for divorce, but Hodler

had abundant cause for a divorce from her, both on account of cruel and inhuman treatment and because of her meretricious relations with Orr. Yet with knowledge of such facts and in consideration of the \$20,000 which he expected to secure, he permitted the plaintiff to obtain a divorce from him on grounds which he knew to be false.

The rule is well stated in 9 R. C. L., page 254, that:

“A husband and wife cannot enter into a lawful agreement for a divorce, and the courts unhesitatingly declare illegal as contrary to public policy any contract intended to facilitate or promote the procurement of a divorce. Hence a contract whereby a wife who has resolved to leave her husband agrees for a stated consideration to relinquish all claims on him as wife provided a divorce is granted to him on or before a fixed date is void and no bar of her right to a year's support and dower after his death. Nor can an agreement to withdraw opposition to or not to contest divorce proceedings form a valid consideration for a contract to pay money. * * Similarly a contract between a husband and wife is invalid where its direct tendency is to interest the husband in procuring a divorce or in foregoing resistance to an effort by his wife directed to that end.”

Greenhood on Public Policy, page 490, lays down the rule thus:

“‘It is quite settled,’ said the court, in Case I, ‘that contracts between husband and wife, so framed as to have effect only on condition that a divorce should be granted, are contrary to public policy, and will not be enforced by the courts. Their tendency is to interest the parties to be benefited in procuring or permitting a divorce; and, though chancery will recognize and enforce some liabilities between husband and wife growing out of implied trusts, and even some growing out of express contracts, yet the courts will never lend themselves to the enforcement of a contract intended to promote the dissolution of marriage. * * Such an

agreement is regarded in law as a fraud upon the court and upon the administration of justice, and no action will lie upon it.' "

And on page 491 it is said:

" 'The object of the agreement,' said the court, in Case III, 'was to bring about a dissolution of the marriage contract, and to put an end to the various duties and relations resulting from it. Any contract, having any such purpose, object, and tendency, cannot be in law sustained, but must be regarded as being against sound public policy, and consequently illegal and void.' "

In *Phillips v. Thorp*, 10 Or. 494, the syllabus holds that:

"The authorities are uniform in holding that any agreement between the parties having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce, to withdraw his, or her opposition, and make no defense, is void, as *contra bonos mores*.

"Such agreements are a fraud upon the law which favors marriage, and will not give its sanction nor lend its aid to uphold or enforce the terms of any contract, nor countenance any contrivance which is designed to promote its dissolution."

The opinion there, by Mr. Justice LORD, cites and quotes from the early case of *Adams v. Adams*, 25 Minn. 72, 79, in which it is said:

"The authorities are uniform in holding that any contract between the parties, having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce, to withdraw his or her opposition, and to make no defense, is void, as *contra bonos mores*, and that any note executed in consideration and pursuance of any such agreement, is without valid consideration, and void."

The Adams case was a suit to recover upon:

"One of several negotiable promissory notes which were given by the defendant to the plaintiff, at the same time, and upon one and the same entire consideration. They all originated in the same transaction, having been given in pursuance of an alleged illegal agreement, entered into between the parties while they were husband and wife, for the purpose of procuring a divorce between themselves, in an action then commenced by the plaintiff against said defendant. The defense interposed and relied on in this action is this alleged illegality in the consideration of the note, it being claimed that said agreement was void as against public policy."

The plaintiff there contended that the defendant was precluded from impeaching the validity of the note sued upon by showing that it was given in pursuance of a void agreement, because he was a party standing *in pari delicto*. It was there conceded that—

"The note in question was given in pursuance of the written agreement, and to carry out its provisions. It was, in fact, a part of the agreement, resting wholly upon its validity for support, and the plaintiff now asks the aid of the court in enforcing it. The point is not well taken."

The opinion further says:

"Testing the agreement in question by these principles, it was clearly illegal and void as against public policy, and the decision of the court in regard to its validity was right. At the time the agreement was entered into, the parties were still husband and wife. It contemplated the fact that divorce proceedings had already been or were about to be instituted by the plaintiff against the defendant, for the purpose of procuring a dissolution of their marriage relations. By its terms, defendant agreed to pay her one thousand dollars down, to execute his four promissory notes, for \$1,000 each, with security, and to place the same, to—

gether with other property, in the hands of a third party, to be delivered to her upon the happening of the event therein provided, as hereinafter stated. * * The agreement expressly provides that said notes and other property so placed in escrow are 'to be delivered to her when she shall have obtained a decree of divorce' from her said husband, the defendant, and not before."

The case of *Muckenburg v. Holler*, 29 Ind. 140 (92 Am. Dec. 345), discussing a similar contract, said:

"Its direct tendency was to interest the present plaintiff in procuring a divorce, or in foregoing resistance to an effort by his wife directed to that end. The marriage relation is not thus to be tampered with, and the courts, by contract of the parties, converted into mere registers of their agreements for separation from the bonds of matrimony. The law favors marriage, and cannot therefore sanction contracts intended to promote its dissolution by lending itself to their enforcement."

Palmer v. Palmer, 26 Utah, 31 (72 Pac. 3, 99 Am. St. Rep. 820, 61 L. R. A. 641), is an exhaustive case, in which the court there said:

"Moreover, where, as appears in this instance, the parties agree that the one shall bring a suit to dissolve the marriage, and that the other will make no defense, or a mere nominal defense, which is indicated by the context, the agreement becomes collusive and fraudulent, and is without validity. A contract of this character may be regarded as a fraud upon the court, and it comes within the reason of the maxim, '*ex turpi causa non oritur actio*.' * * The welfare of humanity, the intelligence and progress of the human race, high moral and social ethics, alike demand this. Any other method or device by which the contracting parties attempt to sever or to facilitate the severing of the bonds of matrimony, in the eye of the law, contravenes public policy, is regarded as *contra bonos mores*, and is void and ineffectual. Therefore a contract which is designed to facilitate the procurement of a divorce, to put an end

to the marriage status, and absolve parties from all their marital obligations, imposed upon them by the law of matrimony, cannot be enforced."

Numerous authorities are cited in the opinion, to the effect that—

"Courts will not enforce any contract which is the price of consent by one party to the marriage relation to a procurement of a divorce by the other."

In 9 Cyc., page 519, we find the following:

"If the object of a contract is to divorce man and wife the agreement is against public policy and void. * * To induce a wife to sue for a divorce by a promise on the part of the husband to remunerate her for it, or for a husband and wife to agree that one of them shall bring a suit for a divorce and the other shall not defend, is against the law which recognizes and upholds the sanctity of marriage and is void."

Under such authorities and the facts disclosed by the record, the divorce decree rendered by the Circuit Court of Clatsop County was a fraud upon that court and the contracts between the plaintiff and the defendant were null and void as against public policy.

The trial court found as conclusion of law No. 5:

"That the plaintiff and defendant Hodler are *in pari delicto*, but not in the same degree, Hodler being the more guilty party to the aforesaid contractual transactions and the execution of said note and mortgage."

The testimony was taken in open court and the case was bitterly contested. The trial judge saw the witnesses and in many instances took an active part in their examination. The record is voluminous, covering over thirteen hundred typewritten pages, including numerous exhibits. The question as to the actual blame which should be placed upon each party is largely one of fact, and under all the circumstances we

think that the opinion of the trial court is entitled to some weight. While as to all other matters exclusive of the written contracts, "Exhibits 'A' and 'B,'" it may be true that the Hodlers were both *in pari delicto*, it is not true as to "Exhibit 'B'" in particular. In that contract Hodler was the moving party; he showed a mercenary disposition and undertook to drive a hard bargain, seeking to be relieved of the support and maintenance of the minor children and to thrust that burden upon the mother of his own offspring. Except to purchase a suit of clothes for one of them, it appears from his own evidence that Hodler has not contributed a dollar to the support of his children since the plaintiff procured her divorce. Again, the only interest which Hodler ever had in the real property involved was an inchoate right of curtesy. The plaintiff was the exclusive owner in fee simple of the realty by a conveyance from her mother, and the title was not acquired by their joint efforts. The only claim thereto which Hodler could assert was for the value of his labor and services in the management and improvement thereof while he and the plaintiff were husband and wife. We quote from the opinion of the trial court:

"All she [the plaintiff] has in pursuance of the contract and in accordance with its terms is the quitclaim deed from Hodler to his interest in her lands, which deed conveyed nothing, as he had no interest in her lands."

In the execution of that contract Hodler was more than equally guilty with the plaintiff. "Exhibit 'B'" was executed after they were divorced and that fact strongly supports the contention of the plaintiff that even then she was acting under fear and duress.

Taken as a whole, the complaint states a cause of suit for the cancellation of the \$16,000 note and mort-

gage and a return of the money paid. The first and third grounds are largely founded upon duress, but the allegations are broad enough to sustain a decree that the \$16,000 note and mortgage should be canceled upon the ground that they were void and without consideration.

2. Assuming that the allegations of duress are not sustained by the evidence and that the parties were *in pari delicto*, the defendant Hodler admits the execution of the respective contracts and that the divorce was obtained pursuant thereto. In addition he pleads affirmative defense tending to show that the agreements were supported by a good and valid consideration; that they were executed in good faith; that he relied thereon; that the plaintiff acquiesced therein for about two years and paid the annual interest on the \$16,000 note, and that she ought now to be estopped to claim or assert that the note and mortgage were null and void. He alleges that he advanced moneys to and performed labor and services for the plaintiff which would constitute a valid consideration for the contracts; that he had a valid defense to the divorce suit, but that in reliance upon the agreements he did not appear or make any defense. As affirmative relief he prays for a decree that the \$16,000 note and mortgage be declared valid and binding and for "such other and further relief as may appear to be equitable in the premises." Since he has made such admissions, pleaded such defenses, asked for such affirmative relief and tried the case on such issues, we are of the opinion that the defendant cannot question the jurisdiction of the court to render a decree of cancellation upon the ground that the parties are *in pari delicto*.

This is not a suit in which the plaintiff seeks to recover upon or enforce a contract which is void as

against public policy. It is brought to cancel a note and mortgage of record alleged to have been procured through fear and duress and to be void and without consideration. Here Hodler as a defense claims and alleges that the note and mortgage are legal and supported by a good consideration, and prays for a decree that they be declared valid and binding. Both parties submit themselves and the subject matter of the suit to the jurisdiction of the court and pray for equitable relief. As said in *Leadbetter v. Hawley*, 59 Or. 422, 424 (117 Pac. 289, 290):

“The plaintiff is in court, not in favor of his agreement, but in spite of it; not to enforce it, but to be relieved from it. * * A contract becomes executed when all is done that the terms require to be performed. Until that situation is attained, the contract is executory.”

3. The real essence of the contract was that in consideration of her payment of \$20,000 to Hodler the plaintiff should have a divorce from him. In legal effect \$4,000 of that amount was paid at the time of the execution of the contract, and the remaining \$16,000 was evidenced by a promissory note dated February 1, 1915, to be paid on or before three years after date, with interest. As to the money which was actually paid, it was an executed contract. As to the money which was to be paid as evidenced by the promissory note, it was an executory contract and would not become fully executed until the whole amount of the \$16,000 note was actually paid. With regard to all moneys which were paid over by the plaintiff under the terms of the contract, she is without a remedy. To that extent this is an executed contract.

4. Defendants' counsel contend that if the \$16,000 note and mortgage are void as against public policy,

the suit should be dismissed, citing and relying upon the case of *Horseman v. Horseman*, 43 Or. 83 (72 Pac. 698), where the rule is laid down that—

Equity “will not enforce a specific performance relative to the conveyance of the homestead, neither will it require a surrender or cancellation of the unpaid note and mortgages, or interfere to relieve against the condition in which the parties have voluntarily placed themselves.”

In that case the plaintiffs were the moving parties and sought the specific performance of a contract which the court found was against public policy, and the defendants made a general denial, pleading no affirmative defenses nor asking for a decree that the contract be declared valid and binding.

In the pending suit it must be conceded that the validity of the note and mortgage is the real issue. It is the plaintiff who seeks to have them canceled, and Hodler who wants them declared valid. In a suit to foreclose the mortgage, the defendants could plead and successfully defend upon ground that it is void and without consideration. This is a suit in equity and the subject matter and all parties in interest are in court.

After a careful consideration of the numerous questions ably presented by distinguished counsel, we hold that the decree of the lower court should be affirmed without costs to either party.

AFFIRMED.

BENNETT, J., dissents.

HARRIS, J., Dissenting in Part.—I concur in the view that, under the rule established by recognized authorities, the contract made between Delia Hodler and Louis Hodler on January 8, 1915, was, on account of the attending circumstances, in contravention of

public policy. I also concur in the view that the plaintiff is not entitled to any affirmative relief on account of the Tierney note and that she is not entitled to a return of any moneys paid by her to the defendant or to Eliza Stone; but I dissent from the conclusion that the plaintiff is entitled to any affirmative relief whatsoever on account of the \$16,000 note and mortgage.

The record presented on this appeal convinces the writer that the litigants are *in pari delicto* and that this result is inevitable under any and every rule by which we are accustomed to gauge and measure human conduct. If the motive which prompted the one to sign the contract was sordid, the motive which prompted the other was equally gross. As the writer views the record the evidence utterly fails to show that the plaintiff acted under duress; but upon the contrary her every act was voluntary, although influenced by motives which are not invulnerable to criticism.

The illegal purpose of the contract of January 8, 1915, was consummated prior to August 8, 1917, the date when this suit was commenced. Not only was the suit for a divorce prosecuted to a decree but also the sum of a thousand dollars agreed to be paid by the plaintiff was actually paid by her, the Tierney note agreed to be transferred by her was in fact transferred and the \$16,000 note and mortgage agreed to be executed and delivered by her were in truth made and delivered by her to the defendant; consequently so far as the provisions of the contract of January 8, 1915, are concerned they were executed. It is contended, however, that the contract of January 8th must be deemed to be an executory contract because the \$16,000 note remains unpaid. In *Cincinnati, H. & D. R. Co. v. McKeen*, 64 Fed. 36, 46 (12 C. C. A. 14, 25), a precedent

in all its essential particulars exactly parallel with the case now under discussion, Mr. Justice HARLAN, when deciding whether a contract providing for a note continued to be an executory contract while the note remained unpaid, said:

“It [the contract] cannot be deemed to have been executory because of the nonpayment of the note for \$669,150 prior to the commencement of this suit. The written agreement of June 1, 1887, so far as it related to the balance of the price of the stock sold to Ives, after crediting the cash payments of \$250,000 and \$639,500, required only the execution and delivery of his note for a specified amount, containing certain provisions, and to be secured by the stock to be delivered to McKeen as collateral.”

Neither the plaintiff nor the defendant should be granted any affirmative relief, but the court ought on its own motion to dismiss this suit and leave both parties exactly as the court found them: *Cincinnati H. & D. R. Co. v. McKeen*, 64 Fed. 36, 46 (12 C. C. A. 14); *Cullison v. Downing*, 42 Or. 377, 383 (71 Pac. 70); *Ah Doon v. Smith*, 25 Or. 89, 94 (34 Pac. 1093); *Jackson v. Baker*, 48 Or. 155, 157 (85 Pac. 512); *Mitchell v. Coach*, 83 Or. 45, 51 (153 Pac. 478, 162 Pac. 1058); 13 C. J. 492, 501, 502.

The fact that the defendant has asked for affirmative relief in nowise alters the rule which ought to be applied in this proceeding. Finding as we do a contract in contravention of public policy and the contract of January 8, 1915, executed so far as concerns the \$16,000 note and mortgage, this court ought to dismiss the suit without relief to either party: *Cincinnati H. & D. R. Co. v. McKeen*, 64 Fed. 36, 46 (12 C. C. A. 14).

BENSON, J., concurs.

Modified as to costs and rehearing denied February 10, 1920.

ON PETITION FOR REHEARING.

(187 Pac. 604.)

On petition for rehearing, former opinion modified as to costs, otherwise approved and rehearing denied.

MODIFIED AS TO COSTS. REHEARING DENIED.

Mr. Edmund B. Tongue and Mr. Thomas H. Tongue,
for the petition.

Mr. Thomas Mannix, Mr. Guy L. Wallace and Mr.
Frank Schlegel, contra.

JOHNS, J.—The original agreement known as exhibit "A" was executed on January 8, 1915. This was modified by another writing on January 30, 1915, by which the plaintiff undertook and agreed that she would "at her own cost and expense suitably support and educate and maintain the two minor children of the parties hereto during the minority of such children and during the minority of the younger thereof," and that she would protect and save harmless the defendant "from any liability arising out of and because of the signing of any notes or other evidence of indebtedness by said Louis Hodler, in connection with the purchase of any real estate now standing in the name of the said Delia Hodler." On February 1, 1915, the plaintiff executed to the defendant her certain negotiable promissory note for \$16,000, payable to his order on or before three years after date, with interest at the rate of 7 per cent per annum. Concurrent therewith and to secure the payment thereof, she executed to him the real mortgage upon the land in Washington County,

the title to which was conveyed to her by her mother. Within a few days after its execution the \$16,000 note was indorsed and delivered by Louis Hodler to the defendant Eliza Stone, who became the apparent owner and holder thereof, and to whom the plaintiff paid one year's interest. The complaint in this suit was filed on or about August 8, 1917, and Eliza Stone was made a defendant, for the reason that she claimed to be and apparently was the owner and holder of the note and mortgage. The complaint alleged that while she claimed to be such owner, in truth she was not, and that the note was indorsed without consideration, and that she held it in trust for the use and benefit of the defendant Louis Hodler.

It will be noted that the \$16,000 note was dated February 1, 1915, and by its terms became due and payable on or before February 1, 1918; that this suit was commenced on or about August 8, 1917; that Eliza Stone was made a defendant because she was the apparent owner of the note and mortgage, and that to obtain a decree, in addition to all other matters, it was necessary for the plaintiff to allege and prove that the transfer from Louis Hodler to Eliza Stone was without consideration, and that the latter defendant held the note in trust for the use and benefit of Hodler.

Counsel for Louis Hodler now vigorously contend that the Hodlers are *in pari delicto*, and for such reason neither party is entitled to relief, and that the suit should be dismissed.

As we pointed out in the former opinion, the plaintiff does not rely upon the contract or seek to have it enforced. For her cause of suit she alleges that it was executed by her through fear and duress and that it was null and void, as against public policy. In his further and separate answer the defendant Hodler pleaded

that it was a valid and binding contract, and that it was not executed under duress, and he prayed for a decree that it be enforced. Those were the issues upon which the case was tried.

The Circuit Court found that the agreements were executed by the plaintiff under fear and duress, and were void as against public policy, and that the fault of the defendant was greater than that of the plaintiff.

As we construe the record, Delia and Louis Hodler were *in pari delicto* in the execution of the original contract, exhibit "A," and in the proceedings to obtain the decree of divorce. The agreement of January 30, 1915, shows upon its face that it was based upon, is a part and a continuation of the original contract of January 8, 1915. At that time the son Albert was sixteen years old, and Joseph was thirteen. By that instrument it was agreed that the father should be released from any liability for their care, maintenance or education, and that the mother alone should assume all such cares and duties. It appears that one of the boys was then almost a cripple, and in the need of constant care and attention. Although there is no testimony as to the gross amount of such expense until such time as each of them would arrive at the age of majority, it is fair to assume that for the five and eight year periods it would be several thousand dollars, and the question naturally arises, why Louis Hodler should be relieved from that burden and the sole responsibility be thrust upon the mother of his own offspring. As stated in the former opinion, the execution of the agreement of January 30, 1915, by the plaintiff was strong evidence that she was then acting under fear and duress.

Much reliance is placed upon the case of *Cincinnati H. & D. R. Co. v. McKee*, 64 Fed. 36 (12 C. C. A. 14), in which Section 1 of the syllabus reads:

“Where the parties are *in pari delicto*, an executed contract will not, as a general rule, be set aside because of want of authority to make it.”

But it further says:

“That the contract had been fully executed; and both parties being equally chargeable with notice of its illegality, and no circumstances of oppression or fraud on defendant’s part being established, it would not be set aside, nor would the note be canceled, the illegality of the contract being a complete defense at law, and the note being overdue at the commencement of this suit.”

The opinion in that case holds:

“In respect to the prayer for the cancellation of the note given by Ives, there is no need for the interposition of equity, even assuming the contract, in all its parts, to have been illegal and void as beyond the corporate powers of the railroad company. If, at the time this suit was commenced, the company was liable to suit by McKeen, either at law or in equity, upon the note itself, or for its amount as being the balance of the stipulated price for the shares purchased by Ives, trustee, the illegality of that contract would have been a complete defense. Upon the theory that the contract was *ultra vires* of the plaintiff, it may be that a suit in equity might have been maintained for the cancellation of the note, if one had been commenced before the note fell due, and while there was danger of its being transferred to a *bona fide* holder for value, without notice from the note itself or otherwise of the illegality of the contract out of which it arose. But this suit was not brought until after the maturity of the note, and therefore a transfer of it, after the institution of this suit, to a third person, would not have cut off any defense that the railroad company could have made as against McKeen, the payee.”

There the note was past due, the illegality of the contract would have been a complete defense in an action at law, and for such reason a court of equity did not

have jurisdiction. In the instant case, the suit was brought before the note became due and payable, when it was in the possession of a third party who was the apparent owner thereof, and to whom the yearly interest had been paid on that assumption. While the McKeen case is authority upon the point for which it was cited in the dissenting opinion of Mr. Justice HARRIS, it is equally good authority for holding that a suit in equity, brought before the maturity of a void note, may be maintained for the cancellation thereof, especially where the note is in the hands of a third party who is the apparent owner and holder, as in the instant case.

Complaint has been made that without any reference to either of them the original opinion overrules the cases of *Henderson v. Henderson*, 37 Or. 141 (60 Pac. 597, 61 Pac. 136, 82 Am. St. Rep. 741, 48 L. R. A. 766), *Ogilvie v. Ogilvie*, 37 Or. 171 (61 Pac. 627), and *Ross v. Ross*, 21 Or. 9 (26 Pac. 1007). The Ross case cites Section 499 of Hill's Code, now Section 511, L. O. L., which provides that:

“Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided third part in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided in Section 513; and it shall be the duty of the court in all such cases to enter a decree in accordance with this provision.”

It appears that the plaintiff and the defendant, William Ross, were married in Umatilla County on July 9, 1886, and lived together as husband and wife until February 2, 1888, when the wife commenced a suit for divorce in Morrow County, on the grounds of cruel and inhuman treatment, and that a divorce was granted

March 16, 1888, on the grounds alleged in the complaint. At that time the defendant was the owner of a large amount of real property, no reference to which was made in the complaint and of which no disposition was made in the decree. On April 1, 1888, William Ross died intestate, after which the plaintiff brought a suit against his heirs and the administrators of his estate, claiming that as his divorced wife, under the above section of the Code, she was entitled to an undivided one-third interest in all of the real property of William Ross at the time of his death. She alleged that when she brought her suit for divorce she was acting under duress, and for that reason did not set forth in her complaint her claim to the real property. The court found that she was not acting under duress, and that at the time the divorce suit was brought the defendant deposited in a Pendleton bank a deed to her for about 1,200 acres of land, which was delivered to her after the decree was rendered; that in addition thereto she had received other property and money from him to the amount of about \$2,000; that she had brought nothing to her husband, and lived with him only about a year and a half, and that for such reason she was estopped to claim an undivided one-third interest in his real property under the terms and provisions of Section 499 of Hill's Code. That was the only point decided in the Ross case.

In the Henderson case the plaintiff was also granted a divorce from the defendant, and by the terms of the decree the defendant was required to support and educate their minor child until the latter reached majority and to pay the plaintiff \$150 per month as alimony. The decree was founded upon a written stipulation between the parties, which was embodied in and made a part of the decree. Afterwards the defendant sought

to have the amount of this alimony reduced to \$75 per month. The plaintiff contended that he should be estopped to claim such reduction; that it had been stipulated between them that he should pay \$150 per month to her, and that this agreement had been embodied in and made a part of the decree. The defendant urged that the stipulation was void as against public policy, and the opinion there held:

“It may be stated, generally, that any contract or agreement between husband and wife, which, by its terms or effect, is conducive to a relaxation or a severance of the marital ties, is void, as contrary to public policy, and will not be upheld or maintained. But where a separation has been induced, not by collusion, but by the vicious conduct or disability of one of the parties, without inducement or fault of the other, and it has furnished just grounds for legal separation, then a contract looking to a settlement of property rights and the proper maintenance of the one not in fault is in no sense repugnant to public policy.”

The court further said:

“When such an agreement has been approved by the solemn decree of the court, it becomes forever binding, to the same degree and with like effect as ordinary contracts between parties admittedly *sui juris*, and is not subject to revocation or modification, except by the consent of the parties thereto.”

There the stipulated alimony was to be paid to the plaintiff, who obtained the decree, by the defendant, against whom it was rendered.

In *Ogilvie v. Ogilvie*, 37 Or. 171 (61 Pac. 627), citing *Henderson v. Henderson*, 37 Or. 141 (60 Pac. 597, 61 Pac. 136, 82 Am. St. Rep. 740, 48 L. R. A. 766), the opinion says:

“Where a separation has been induced, not by collusion, but by the vicious conduct of one of the parties,

without inducement or fault of the other, and it has furnished just grounds for divorce, then a contract looking to a settlement of the property rights and the proper maintenance of the one not in fault could properly be entered into, as not repugnant to public policy."

In the instant case it was the plaintiff, and not the defendant Louis Hodler, who obtained a decree of divorce; and by the terms of that decree it was the plaintiff, Delia Hodler, "at whose prayer" the decree of divorce was rendered. It was there adjudicated that Louis Hodler was in fault, and that Delia Hodler had just and legal grounds for divorce. He aided and facilitated the obtaining of that decree on the grounds alleged, and Section 511, L. O. L., above quoted, gives an undivided one-third interest in the real property to the party in whose favor the decree is rendered only when that party is not at fault. Here, it is the plaintiff who obtained the decree of divorce, who asked to have the property agreement declared null and void, and the defendant against whom the decree was rendered in an affirmative defense pleads that it is valid and binding.

As he was at fault himself, and his wife had just grounds for a divorce, the defendant Louis Hodler would not have any statutory claim of one third or any interest in her property for compensation as one of the conditions by which she should obtain a divorce.

The decisions in each one of those three cases relied upon by counsel are founded upon the particular facts in each case and there is a marked difference between each of them and the facts in the Hodler case. The original opinion in the Hodler case does not overrule or in any particular modify the opinion of this court in any one of those cases.

On January 8, 1915, Delia Hodler and Louis Hodler entered into a contract by which she was to apply for and obtain a divorce from him upon the grounds of cruel and inhuman treatment, for which after the decree was rendered she was, in legal effect, to pay him \$20,000. He aided her in obtaining the divorce on such grounds. At his instance and request the agreement of January 30th was executed, by which she assumed the education, care and maintenance of their two minor children, and he was relieved from any liability therefor. On February 1st, she, in effect, paid him \$4,000 in money, and gave him her note secured by a real mortgage on her property, payable on or before three years after date with interest at 7 per cent per annum, and he in turn gave her quitclaim deeds for the real property of which she was the owner and the title to which was in her name. About August 8, 1917, she commenced this suit to cancel the \$16,000 note and mortgage upon the grounds that they were obtained under fear and duress and were void as against public policy.

For affirmative answer the defendant pleaded that the agreement was valid; that he relied thereon; that if he had not, he would have contested her divorce and filed a cross-complaint to obtain a divorce from her; that he was always a faithful, kind and loving husband, and that his then wife never had any just grounds for a divorce for cruel and inhuman treatment, or for any other reason; that he had a good and valid defense to her divorce suit, and that in truth and in fact he had a just cause of complaint for a divorce from her, not only upon the grounds of cruel and inhuman treatment but on account of her meretricious relations with Orr. His sworn testimony strongly supports such contentions. His niece, Clara Wenger, was a witness for

Delia Hodler in the divorce suit and gave strong corroborative testimony as to specific acts of cruel and inhuman treatment towards the plaintiff.

As a witness for him in this suit Clara Wenger now testifies that she committed perjury in the divorce suit, and that Hodler was a kind and loving husband. It is upon such a state of facts that the authorities were cited in the original opinion upon which we then held and now hold that the contract between the Hodlers was void as against public policy, and that he was not entitled to enforce payment of the \$16,000 note.

It is now vigorously contended that the parties should be left in the same position they were before the suit was filed, and that neither of them should have relief, and numerous decisions of this court are cited to the effect that—

“Whenever it shall develop during a trial that the contract, the subject of the controversy, is fraudulent, the court will of its own motion dismiss the proceeding.”

We have no fault to find with the law laid down in those decisions, but we are confronted with the undisputed facts in the Hodler case. The plaintiff, as the moving party, does not seek to enforce a void contract, but to be relieved from it. It is the defendant, Hodler, who as an affirmative defense pleads the validity of the contract and seeks to have it enforced. As pointed out, at the time the suit was brought the \$16,000 note was in the possession of a third party who claimed to be its owner, and, while as between the Hodlers the note was void, to protect the plaintiff it was necessary to have that fact established by a decree of court, which cannot be done if the suit is dismissed. Neither was there anything to prevent other and dif-

ferent transfers of the note to other parties, and to prevent that the plaintiff applied for and was granted an injunction restraining the defendants from the further sale or assignment of the note pending suit. It must be conceded that equity would have, and did have, jurisdiction to determine who was the true owner of the note and to prevent its transfer, and that in those particulars the plaintiff would not have complete and adequate remedy at law.

We have examined every Oregon case cited by counsel, and while it is true that, upon the facts stated in each, they lay down the rule of law for which counsel contend, it is also true that there is a material difference between the facts in the Hodler case and any of those cases relied upon, and that no Oregon case can be found where the vital and material facts are similar to those in the Hodler case.

5. The jurisdiction of equity must depend upon the actual facts as they exist at the time the complaint was filed and the relief which is sought to be obtained by both the plaintiff and the defendant, as evidenced by the pleadings. At the time the plaintiff had outstanding and in the hands of a third person, who claimed to be and was apparently the owner, her void negotiable promissory note for \$16,000, from which she could only obtain relief in a suit in equity, and to obtain which it was necessary to make, and she did make, the holder of the note a defendant. Here there was not only danger of the note being transferred, but it had actually been transferred to an apparent holder for value. For such reason, under the law laid down in the McKeen case, the suit could be maintained where it was "commenced before the note fell due, and while there was danger of its being transferred to a *bona fide* holder for value, without notice from the note itself or

otherwise of the illegality of the contract out of which it arose.”

6. After a careful consideration of the able and vigorous petition of counsel for defendant Hodler, for a rehearing, we adhere to our original opinion on the merits.

7. This case has been expensive and was bitterly contested. The transcript was filed in this court by the defendant Hodler. We are advised that it cost \$800, and we assume that to be true. The plaintiff also appealed, but there was only one transcript filed in this court. By the former opinion neither party was to have costs. But as the plaintiff had the benefit of the transcript filed by the defendant Louis Hodler, we feel as a matter of justice and equity that she should pay for one half of that transcript. The original decree of this court is therefore modified, and the defendant Louis Hodler is given judgment for costs against the plaintiff, Delia Hodler, for the sum of \$400 with interest thereon from December 21, 1918, at the rate of 6 per cent per annum. Otherwise, the original decree of this court is affirmed, and the petition for rehearing is denied.

McBRIDE, C. J., concurs in the opinion.

BEAN and BURNETT, JJ., concur in the result.

BENNETT, J., dissents.

HARRIS, J., Dissenting.—When dissenting from the original opinion, the writer stated that “the record presented on this appeal convinces the writer that the litigants are *in pari delicto*.” This statement necessarily involves the idea that both the parties entered into an agreement condemned by the law; and this

statement also necessarily involves the idea that the two parties to the agreement were equally culpable, for such is the meaning of the words "*in pari delicto*." The majority of the court, speaking through Mr. Justice JOHNS, say:

"As we construe the record, Delia and Louis Hodler were *in pari delicto* in the execution of the original contract, exhibit 'A,' and in the proceedings to obtain the decree of divorce."

This is equivalent to saying that the parties entered into an illegal contract, and that in making it one party was just as culpable as the other. If the contract was illegal and the parties were equally guilty, then there is no possible room for saying that Louis Hodler duressed Delia Hodler. If Louis Hodler forced Delia Hodler to sign under duress, then she could not have been *in pari delicto*; and if she was *in pari delicto*, she could not have signed under duress. In the circumstances presented here, the idea that she signed under duress cannot co-exist with the idea that she was *in pari delicto* with the party duressing her. The two ideas cannot exist together, for one completely destroys the other. The suggestion that the writing of January 30, 1915, evidences duress cannot harmonize with the expressed conclusion that the parties are *in pari delicto*.

The case did not come on for trial in the Circuit Court until April, 1918, which was after the maturity of the note, and the decree was not rendered until August 15, 1918.

- I am of the opinion that Delia Hodler did not act under duress. I agree with the conclusion that the parties are *in pari delicto*; but I think, for the reasons given when dissenting from the original opinion, that this suit should be dismissed without relief to either

party. I agree with the conclusion, however, that in any view of the case the plaintiff should be required to pay one half the cost of the transcript of testimony used on the appeal.

BENSON, J., concurs.

Argued January 6, affirmed February 10, 1920.

UTAH-IDAHO SUGAR CO. v. LEWIS, SHERIFF.

(187 Pac. 590.)

Parties—Error in Substitution of Sheriff's Successor as Defendant Waived by Answering and Seeking Affirmative Relief.

1. In a replevin action brought against the sheriff, an order of substitution of the sheriff's successor in office as defendant if erroneous was waived by defendant by answering and seeking affirmative relief.

Pleading—Answer may Aid Complaint as Against Demurrer.

2. In a replevin action against a sheriff, wherein the sheriff demurred, and the sheriff's successor in office was substituted as defendant, although the complaint was not amended, the substituted defendant by voluntarily answering and supplying all the allegations lacking in the complaint thereby made the complaint good.

Attachment—Deed Record of Real Estate and Personalty Admissible to Show Plaintiff's Purchase of Property Replevied.

3. In a replevin action brought against the sheriff for property, including a tractor and automobile attached, a deed record disclosing a conveyance to plaintiff of the property was admissible to prove the purchase of the property by him, notwithstanding that the date of transfer and recording was subsequent to that of the attachment, and that the instrument was recorded in the deed record.

Evidence—Letter Signed by Vice-president Inadmissible Where No Authority Shown.

4. In a replevin action against sheriff to recover a tractor and an automobile which had been attached, a letter signed by the vice-president of the company from which plaintiff had purchased the property, proposing the organization of a corporation to become a binding contract upon acceptance, was not admissible to show ownership of the property by the judgment debtor in the attachment suit; there being no evidence of the vice-president's authority.

Appeal and Error—Refusal of Continuance not Considered Where Bill of Exceptions Did not in Terms Show that Continuance was Asked.

5. In replevin against sheriff for an automobile and tractor, an assignment of error for refusing a continuance until the minutes of the company from which plaintiff had purchased the property could be obtained could not be considered where bill of exceptions did not show in terms that continuance had been asked.

Appeal and Error—Bill of Exceptions must be Accompanied by Authenticated Transcript of Testimony to Review Directed Verdict.

6. Assignments of error based on rulings relative to motions for nonsuit and directed verdict will not be considered where the transcript of the testimony, although certified by the court reporter, is not attached to the bill of exceptions, and is not authenticated by the trial court.

Appeal and Error—Assignments of Error in Denying New Trial Insufficient Where Proceedings on Motion are not Authenticated.

7. Where an assignment of error based on denial of a motion for new trial is supported in the record only by a copy of the motion for new trial, to which are attached copies of certain affidavits and exhibits which are in no way authenticated except by the certificate of one of defendant's attorneys, with no record of rulings by the court or any counter-affidavits or other appearance by the plaintiff, or evidence as to whether the motion was filed within the statutory time, it will not be considered on appeal.

From Josephine: FRANK M. CALKINS, Judge.

Department 1.

This is an action in replevin. The complaint charges the wrongful taking and detention of the property to have been accomplished by Will C. Smith, who is the only person named as defendant.

To this complaint a demurrer was filed upon the ground that it does not state facts sufficient to constitute a cause of action. Thereafter, and before any hearing was had upon the demurrer, the plaintiff filed a motion wherein it was sought—

“To substitute George W. Lewis, as sheriff of Josephine County, in lieu of the defendant Will C. Smith, as such sheriff, for the reason the term of office of the said Will C. Smith expired January 1, 1917, and the

said George W. Lewis ever since has been, and now is, the duly elected, qualified, and acting sheriff of Josephine County, Oregon."

This motion was allowed, and an order of substitution duly entered. The complaint was never amended to adjust the allegations to the change of defendants. Thereafter the demurrer filed by the original defendant, Smith, was argued and submitted and by the court overruled. In the meantime, and while Smith was still sheriff, the plaintiff had obtained possession of the property by claim and delivery proceedings. Thereafter the defendant Lewis filed an answer wherein, after some admissions and denials, he pleads affirmatively, *inter alia*, that Will C. Smith, at the time of the alleged wrongful taking of the property, was the sheriff of Josephine County; that he had taken the chattels in his official capacity, by virtue of a valid writ of attachment, and that on January 1, 1917, Lewis had succeeded him as sheriff, and prayed for a return of the property or its value, to him as such sheriff.

The reply admits the official capacity of Smith and Lewis, but denies the allegations upon which defendant bases his claim for affirmative relief. A trial was had, wherein the court directed a verdict for plaintiff, and entered judgment thereon, and defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Colvig & Williams*, with an oral argument by *Mr. Fred A. Williams*.

For respondent there was a brief and an oral argument by *Mr. H. D. Norton*.

BENSON, J.—1. The first assignment of error challenges the propriety of the court's action in ordering

the substitution of Lewis as defendant in the action. If, in the first instance, there was any merit in this contention, the defendant by answering and seeking affirmative relief, has made himself a proper and necessary party and waived any objection he may have had to being made a defendant: *Johnson v. White*, 60 Or. 611 (112 Pac. 1083, 119 Pac. 769).

2. It is next urged that it was error to overrule the demurrer to the complaint. It must be remembered that this demurrer was filed by the former defendant prior to the substitution, and as to him, it was a perfectly good complaint. It is true that this pleading was never amended, and contains no allegations which in any manner connect the defendant Lewis with the transaction narrated therein, but this defendant has voluntarily answered, and in his further and separate answer he has supplied all of the allegations which are lacking in the complaint, and the case was tried upon the issues joined by this answer and the reply thereto. It has been held in many cases that under such circumstances the answer aids the complaint and makes it good: *Turner v. Corbett*, 9 Or. 79; *Catlin v. Jones*, 48 Or. 156 (85 Pac. 515); *Treadgold v. Willard*, 81 Or. 658 (160 Pac. 803).

3. The next assignment is that the court erred in overruling defendant's objection to the admission of a certain deed record of Josephine County, disclosing a conveyance from the Oregon-Utah Sugar Company to the plaintiff of all of its assets, both real and personal. The record disclosed that the deed was executed June 7, 1916, filed for record January 22, 1917, and recorded January 12, 1918. We find defendant's objection to the admission of this deed stated thus, in the bill of exceptions:

“This evidence was objected to by defendant as incompetent on account of the dates shown of transfer and recording being subsequent to date of attachment, also the volume being the Deed Record could not impart any notice of transfer of personalty and that the tractor and auto attached not named in the list of property transferred.”

The property in question was attached by Sheriff Smith on June 24, 1916, seventeen days after the execution of the deed in question. It does not appear that it was offered for the purpose of imputing notice to the defendant of plaintiff's claim of ownership, but simply as evidence of the ultimate fact that plaintiff had purchased the property prior to the levy of attachment. The language of the deed, so far as it relates to the personal property, reads thus:

“Also, all other lands, tenements, hereditaments and appurtenances and all and singular the goods, chattels, money, choses in action, all contracts and property, real, personal and mixed of every name, nature and description whatsoever now owned by the said Oregon-Utah Sugar Company, and wherever the same may be situate.”

There was other evidence tending to show that the tractor and automobile involved herein had been owned by the Oregon-Utah Sugar Company, and the defendant himself contended that the debtor for whose debt it had been attached, had acquired title from the same source. The evidence was clearly admissible, as tending to prove the purchase of the property by plaintiff.

4. For the purpose of showing ownership of the property in the judgment debtor in the action wherein the attachment was issued, defendant offered in evidence a writing which was in form a letter signed by the vice-president of the Oregon-Utah Sugar Company, addressed to W. W. Harmon and A. A. Flynn, in which

it was proposed that the latter should at once organize a construction corporation which should undertake the construction of all the improvements contemplated by the Sugar Company, upon the terms therein specified. It also suggested that when the parties to whom the letter was addressed should sign their acceptance of its terms, it should be a binding contract. Paragraph 6 of this writing is as follows:

“To encourage the incorporation of the construction company on a substantial basis, the sugar company will subscribe for five thousand dollars of the proposed twenty-five thousand dollars of capital stock of the proposed construction company, and the sugar company will turn over to the construction company immediately, as part payment of said five thousand dollar subscription, two automobiles, one caterpillar tractor engine, and plows, and such other construction equipment as it now has on hand. The amount credited on such subscription shall be the actual cost of such equipment as is turned over.”

To this offer the plaintiff objected upon the ground that it was not shown that the vice-president of the Sugar Company had any authority to enter into such contract. There is no evidence in the bill of exceptions showing that such construction company was ever incorporated or that any stock subscription was ever made, or that the vice-president was authorized to execute such agreement, or that it was ratified by the Sugar Company. It is said in 10 Cyc. 922, that:

“There is no office pertaining to a private corporation about which both the statute and case-made law have so little to say as that of vice-president. The etymology of the term would indicate that the officer has no functions to perform other than those of an ordinary director, except in case of the absence, disability, or death of the president, when he acts in his stead, pre-

siding at the meetings of the board of directors and performing the other functions of the office."

It is true, that the vice-president signs the instrument in the following style:

"Oregon-Utah Sugar Company,
"By Geo. E. Sanders, Vice-President & Manager."

But without some evidence of his authority, in either capacity, to encourage the organization of an independent corporation, and to subscribe for its capital stock, an instrument like the one offered would not be competent evidence, since the court cannot presume that acts of the peculiar sort set out are within the implied powers of the manager: *Wilson v. Investment Co.*, 80 Or. 233 (156 Pac. 249).

5. The next assignment is that the court erred—

"In refusing the defendant continuance until the minutes of the Oregon-Utah Sugar Company could be produced by Mr. Alex Nibley, secretary of said corporation."

This subject is not discussed in defendant's brief, nor do we find in the bill of exceptions any application for a continuance. All that we find is this:

"The court sustained the objection to the admission of the instrument [referring to the letter which we have just discussed] but permitted it to be identified for the purpose of the exception of the defendant. The defendant thereupon demanded the minutes and resolutions of the board of directors of the Oregon-Utah Sugar Company covering this transaction, from Alexander Nibley, secretary of the Oregon-Utah Sugar Company, and the same were not produced.

"The defendant being taken by surprise and the agreement being regular on its face as to the Southern Oregon Construction Company and as to the Oregon-Utah Sugar Company, an exception was taken to

the court's ruling by the defendant and exceptions allowed."

This does not suggest that a continuance was desired.

6. The remaining assignments of error refer to the rulings of the court in regard to motions for nonsuit and directed verdict. These questions direct our attention to the condition of the bill of exceptions, which, in this case does not contain all of the evidence which was submitted upon the trial. The certificate of the trial judge reads as follows:

"I, F. M. Calkins, Circuit Judge of the First Judicial District of Oregon, do hereby certify that the foregoing bill of exceptions was settled before and by me, and that the same contains a statement of the evidence and questions and answers of all of the material parts of the testimony offered in behalf of the plaintiff in said action and all the substance and material parts of the testimony offered in behalf of the defendant in said action, except that various material items of evidence bearing on the exceptions taken are not set forth herein, but the same are contained in the transcript of all the evidence as certified by F. Roy Davis, official court reporter, and in the various documentary and other exhibits offered in evidence in the trial and by said court reporter duly marked and identified, and that the exhibits referred to in said bill of exceptions as set forth herein are true and correct copies of the exhibits offered and received in evidence, but not all of them, and other exhibits bearing on the point of the various exceptions being either set forth in the complete transcript of the testimony or filed with the same, and that the objections and motions and the rulings thereon are herein correctly set forth, and that the foregoing contains all of the bill of exceptions in the above-entitled action as settled and allowed this 8th day of July, One Thousand Nine Hundred and Eighteen."

There is what purports to be a transcript of the testimony taken in the case, certified by the court reporter,

but it is not attached to the bill of exceptions, and is not authenticated by the trial court. In the case of *Thomson v. Giebisch*, ante, p. 118, (186 Pac. 10), decided by this court on January 6, 1920, the questions presented by the appeal arose upon the rulings of the trial court upon motions for nonsuit and directed verdict. The bill of exceptions did not contain all of the evidence taken upon the trial, but a transcript of the testimony, certified by the official court reporter, was physically attached to the bill of exceptions. In a well-considered opinion, citing many authorities, whose argument it is not necessary to reiterate here, this court held that the questions of nonsuit and directed verdict were not presented in such a manner as to permit their consideration upon appeal. The opinion in that case concludes with these words:

“For reasons indicated, however, and for lack of authentication of the report of the testimony by the trial judge, the bill of exceptions in the record is not sufficient to raise the questions involved in the motions already mentioned.”

7. Finally, it is urged that the court erred in denying defendant's motion for a new trial. Upon this assignment, the only thing to be found in the record is what appears to be a copy of a motion for a new trial, to which are attached copies of certain affidavits and exhibits, but these are in no way authenticated other than by the certificate of one of defendant's attorneys. We find no record of any ruling by the court or any counter-affidavits or other appearance by the plaintiff, or any evidence as to whether or not the motion was filed within the statutory time. In this state of the record, the matter cannot be considered by us. The judgment is affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued January 13, affirmed February 10, 1920.

PATTERSON v. ASHLAND.*

(187 Pac. 593.)

Municipal Corporations—Authority of City to Pave Street and Assess Special Benefits.

1. In view of Ashland City Charter (Laws 1898, p. 100), Article XVII, Section 1, excepting the territory of the city from the jurisdiction of the County Court of Jackson County for road purposes, and Article VII, Section 1, subdivision 2, giving the council power to levy special benefit assessments for road improvements, and Article I, Section 1, giving the city powers possessed by municipal corporations under state laws, and Article XV, Section 2, authorizing the council to pave streets and levy special benefit assessments therefor, and Article VII, Section 1, subdivision 10, authorizing council to supervise public highways and streets, the city had power to pave a street and levy a benefit assessment upon adjacent property as against the objection that such street is a county highway.

Highways—Municipal Corporations—State can Determine Whether City or County shall Control.

2. Both a city and a county in public and governmental capacities are agents of the state, which in its sovereign capacity may supervise them as instrumentalities, and through the legislature direct which shall have jurisdiction over and control of the highways located within the confines of each in a way not inconsistent with the state Constitution.

Municipal Corporations—Estoppel to Object to Validity of Assessment by Waiver of All Defects by Agreement for Payment by Installments.

3. In a suit to set aside a special benefit assessment for street paving, on the ground that the city was without authority to pave the street because it was a county highway, plaintiff having applied for the right to pay such tax by installments under Bancroft Act, Section 1 (Section 3245, L. O. L.), and in her agreement with the city waived "all irregularities or defects, jurisdictional, or otherwise, in the proceedings to construct said pavement," became estopped to assert her claim of the city's lack of authority.

From Jackson: FRANK M. CALKINS, Judge.

Department 2.

The plaintiff appeals from a decree dismissing her complaint in a suit brought for the purpose of annulling a street assessment.

*For authorities discussing the question of necessity of special benefits to sustain assessment for local improvements, see note in 14 L. E. A. 755.

The facts material to the issues herein are admitted by the pleadings or stipulated as follows: What is known as Main Street in the City of Ashland, Oregon, and designated as North Main Street and East Main Street, was duly laid out as a county road more than fifty years ago, and was formerly known as the Oregon and California Wagon Road. The City of Ashland was incorporated by an act of the legislature in 1889 (Laws 1889, p. 339), and by legislative enactments its charter was amended in 1895 (Laws 1895, p. 521) and 1898 (Laws 1898, p. 78), and if the status of the county road has been changed it is by virtue of these enactments. During the year 1911, the city through its officials caused that portion of the street upon which the property described in the complaint abuts to be paved with bitulithic, and assessed the costs of such improvement to the abutting property of the plaintiff, as a special benefit assessment. After the laying of the pavement and after the officials of the city had represented to the plaintiff that the county road was a city street, and that, unless the plaintiff paid the assessments shortly or signed an application to pay the same in installments under the Bancroft Act, the city would proceed to sell the said property, the plaintiff signed and filed with the recorder of the city an application for an extension of time of payments pursuant to Section 3245, L. O. L., and to pay in installments. At the time the paving was laid and at the time the plaintiff signed and filed the application, the plaintiff and the officials of the city had at all times for nearly twenty years prior thereto believed that said road had been and was a city street, subject to the jurisdiction of said officials and not under the control of the County Court of Jackson County, Oregon. It is conceded that in all things and proceedings relating to the improvement of each

of the streets, the levying of special benefit assessments therefor and the equities therein as to the assessments, the making and filing of due applications for extension of time of payment under the Bancroft Act, and the entry of the same in the lien docket of the City of Ashland, the rate of interest and the due sale of the bonds covering the amounts of the benefit assessments were all duly and regularly done, provided said North Main Street and East Main Street were under the jurisdiction of the City of Ashland, with the right to improve the same and assess the costs of such improvements against the real property abutting on these streets, respectively. In accordance with the agreement entered into between plaintiff and defendant, plaintiff paid several of the installments of the benefit assessments. It is stated in the brief that it is estimated that there are four and one-half miles of the paved streets of the city in similar condition.

AFFIRMED.

For appellant there was a brief over the names of *Mr. G. C. McAllister* and *Mr. L. A. Roberts*, with an oral argument by *Mr. McAllister*.

For respondents there was a brief over the names of *Mr. William M. Briggs* and *Mr. E. D. Briggs*, with an oral argument by *Mr. William M. Briggs*.

BEAN, J.—Plaintiff contends that the thoroughfare improved by the city is not subject to the jurisdiction of the city, but is a county road. Defendants maintain that the highway in question is a city street, and that plaintiff is estopped to deny the right of the defendants in making the improvement and assessment by reason of his having made application for an extension of time for payment under the Bancroft Act.

1. The provisions of the city charter enacted by the legislature in 1898, which bear on the case, are as follows:

"Article XVII. Section 1. The territory within the limits of the City of Ashland, as now existing, or as may be hereafter extended is hereby excepted out of the jurisdiction of the county court of Jackson county for licensing purposes and road purposes, and the city council shall have full and exclusive jurisdiction over the same. The inhabitants of the city shall be exempt from the payment of road taxes and assessment of the property within the city for road work except such taxes as may be levied and assessed by the city council, and all such taxes shall be placed in a separate fund and used for street purposes within the limits of the city, and not otherwise": Laws 1898, p. 100.

"Article VII. Section 1 (Subdivision 2) * * And the council shall also have power at any time to levy such special benefit assessments for road, sewer, or other special improvements as they may deem reasonable and just or as adjudged by a board of viewers": Laws 1898, p. 85.

"Article 1. Section 1. * * And have all the general powers possessed by municipal corporations under the statute laws of this state and at common law, and in addition thereto, shall possess all powers hereinafter specifically granted * * ": Laws 1898, p. 80.

The provisions of Article XV, Section 2, authorize the city council, among other things, to cause to be paved or improved any street or alley within the city and collect the expense by special benefit assessment upon the real estate fronting upon such improvement.

A few settled principles of law which are applicable to this case are stated in *Oliver v. Newberg*, 50 Or. 92 (91 Pac. 470). In an opinion in that case of Mr. Justice EAKIN, we find at page 94 of 50 Or. (91 Pac. 471):

"When the city proceeded to act under the charter of its creation, it thereby accepted the relinquishment

and grant of all county roads within its territory, and *ipso facto* they became streets."

On page 95 of 50 Or. (91 Pac. 472) we read:

"Whether a county road becomes a street, when included within the corporate limits of a city, depends upon the intention of the legislature, as gathered from the city charter, general laws and the whole course of legislation on the subject: 2 Dillon, *Munic. Corp.*, § 676 et seq.; *State ex rel. v. Commrs. Putnam County*, 23 Fla. 632 (3 South. 164). Where the legislature has expressly conferred upon the corporation control of the county roads within its boundaries, and excepted the territory within it from county control for road purposes, there is no question but that such highways become streets, and subject to all the burdens of streets. This is definitely stated in 27 Am. & Eng. Enc. Law (2 ed.), 104, and recognized in Elliott, *Roads & Streets* (2 ed.), § 116."

The one question contended for on behalf of plaintiff in this suit is that the highway in question is a county road, and that the city has no jurisdiction to improve the same and assess the expense thereof upon the adjacent property. It must be conceded that the test is not whether we should call the highway a street or a road. The portion of the city charter above quoted and referred to plainly indicates that the area within the City of Ashland is excepted out of the jurisdiction of the County Court of Jackson County for road purposes, and the city council is given exclusive jurisdiction over the same. The inhabitants of the city are subject only to the payment of road taxes and assessment of the property within the city as may be levied and assessed by the city council. In order, it would seem, to make the authority of the city officials doubly sure, Article VII, Section 1, empowers the city council to levy special benefit assessments for "road" "im-

provements"; and by subdivision 10 of the same article and section the city council is authorized to supervise "public highways, streets, alleys, cross-walks, side-walks, gutters, and sewers and cause the same to be kept in repair * * and, if the same is not done by the property owners, may collect any expenses with penalty of such owners of abutting lots as special assessments against the same. It is well understood that the words "road" and "highway" are synonymous.

We fail to find any lack of authority in the city government to do anything necessary in connection with the highway in question. Evidently the framers of the charter intended to steer clear of the question involved in the case of *Heiple v. East Portland*, 13 Or. 97 (8 Pac. 907), and fill the gaps found in some of the earlier city charters, and plainly delineated the intention of the legislature to give the city jurisdiction over the county roads within its limits, and authorize it to improve them and assess the cost thereof against the abutting property.

It will be noticed that the legislative charter grants to the municipality "full and exclusive jurisdiction" over the area embraced within the city limits for road purposes, and empowers the city council to levy special benefit assessments for road improvements. It would be entirely antagonistic to the meaning of the legislative language contained in the charter, to hold that the legislature granted the city council authority to levy special benefit assessments for a road improvement within its territory, when it was not intended to give the municipality jurisdiction over such highway. It is also noticed that Article XVII of the charter, conferring full and exclusive jurisdiction upon the city council for road purposes, is general, and contains no exceptions. There are no specifications of such

authority as to streets and other matters contained therein, with roads omitted, so that it might be inferred that roads were excepted, as appears in some of the earlier city charters.

2. A municipal corporation, acting in its public or governmental capacity, is an agent of the state. The same is true of a county government. The state in its sovereign capacity may well supervise its instrumentalities and through the legislature direct which of the corporations shall have jurisdiction over and control the highways located within the confines of each, in any way not inconsistent with the Constitution of the state: *Bowers v. Neil*, 64 Or. 104 (128 Pac. 433); *Cole v. Seaside*, 80 Or. 73 (156 Pac. 569).

3. Error is predicated upon the finding of the Circuit Court to the effect that after the board of viewers had estimated and appraised the property of plaintiff and the special benefits accruing to the same by virtue of the improvement, the plaintiff, in writing, applies for an extension of time of payment of the assessments, and thereby waived all objections either jurisdictional or otherwise, to such assessments, and agreed to pay the same in installments, a part of which she has paid, and she should be estopped in the premises to raise any objections to the special benefit assessment, either in the matter of authority on the part of the defendant city to levy the same or otherwise.

The application for payment by installments, framed under the Bancroft Act, had the following clause in it:

“That I do hereby waive all irregularities or defects, jurisdictional or otherwise, in the proceedings to construct said pavement for which said assessment is levied and in the apportionment of costs therefor. And I hereby make this, my written application to pay the said sum so assessed in ten annual installments;

and I hereby promise and agree to pay the said sum so assessed in ten annual installments, and I hereby promise and agree to pay the said sum of Two Hundred Sixty-nine and 46-100 Dollars to the said city of Ashland, in ten annual installments, and within ten years after the filing hereof, with interest thereon at the rate of six per cent per annum, as in said Ordinance provided. Principal and interest payable in lawful money of the United States of America.

“(Signed) S. E. PATTERSON,
“Applicant and Property Owner.”

At the time of the making of the application and contract referred to, the plaintiff was the owner of the property described, against which a special assessment had been made for street improvements in front of the property. It was entirely appropriate for the city and the plaintiff to settle and adjust the matter by a contract, and include therein the time and manner of payment. The law favors such settlement. Therefore if the plaintiff really had any valid objection to the assessment, she waived the same and “all irregularities or defects, jurisdictional or otherwise, in the proceedings to construct” the pavement for which the assessment was levied, and is precluded thereby from denying liability to pay for such improvement. It is pleaded and urged by plaintiff that she did not know at the time she signed the application and contract that the city did not have jurisdiction over the highway, and therefore she should not be estopped thereby. The contract shows upon its face that there might be a question as to the jurisdiction of the city over the street, and the purpose of the agreement and the statute authorizing the same is to set at rest the question of jurisdiction and liability for payment for the pavement: *Parker v. Hood River*, 81 Or. 707 (160 Pac. 1158);

Waggoner v. City of La Grande, 89 Or. 192, 208 (173 Pac. 305); *Colby v. Medford*, 85 Or. 499 (167 Pac. 487).

The decree of the lower court is therefore affirmed.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued January 13, affirmed February 10, 1920.

WHITE v. ASHLAND.

(187 Pac. 596.)

From Jackson: FRANK M. CALKINS, Judge.

Department 2.

In this suit the plaintiff seeks to avoid liability for the expense of the improvement of a street in front of his lots. Being dissatisfied with the decree rendered in favor of the defendants, he appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. G. C. McAllister* and *Mr. L. A. Roberts*, with an oral argument by *Mr. McAllister*.

For respondents there was a brief over the names of *Mr. William M. Briggs* and *Mr. E. D. Briggs*, with an oral argument by *Mr. William M. Briggs*.

BEAN, J.—The facts admitted by the pleadings and stipulated are the same as those in the case of *Patterson v. Ashland*, ante, p. 233 (187 Pac. 593). This case is governed by the same principles announced in that case, an opinion in which was rendered on this date. The stipulation of the parties precludes the considera-

tion of any question, except the jurisdiction of the city over the thoroughfare mentioned.

For the reasons given in the Patterson case, the decree of the lower court is affirmed.

'AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, J.J., concur.

Argued December 31, 1919, affirmed February 10, 1920.

MALPICA v. CANNERY SUPPLY CO.*

(187 Pac. 596.)

Appeal and Error—No Reversal for Excessive Damages in Absence of Prejudicial Error.

1. Under Article VII, Section 3, of the Constitution, as amended by Laws of 1911, page 7, in a servant's action for injuries, where the jury was properly instructed, and there is no prejudicial error in the record, the only assignment of error being the amount of the verdict, it was for the jury only to find the amount of plaintiff's damages, and, it having done so by unanimous verdict, the Supreme Court cannot reverse as for excessive damages, a ground of defendant employer's motion for a new trial.

Damages—Twelve Thousand Dollar Verdict for Broken Wrist and Impaired Arm not Invalid.

2. Where a servant injured through a fall of staging sustained a broken wrist and was subjected to great pain and mental anguish, while the wrist was permanently injured so that the servant could not use it or his hand, the use of his arm being greatly impaired, the Supreme Court will not set aside verdict for \$12,000, though trial court stated he was of opinion recovery should not be for more than \$2,000.

[As to what is excessive verdict in action for personal injuries not resulting in death, see notes in 16 Ann. Cas. 8; Ann. Cas. 1913A, 1361.]

From Multnomah: **CALVIN U. GANTENBEIN, Judge.**

*For authorities passing on the question of excessiveness of verdicts in actions for personal injuries, specifically as to fractured wrists, see comprehensive note in **L. R. A.** 1915F, 472. **REPORTER.**

Department 2.

The defendant is an Oregon corporation engaged in the business of canning salmon and storing and transporting salmon cans in boxes to Nushagak, Alaska. On March 30, 1918, the plaintiff entered the employ of the defendant for the fishing season of that year, for which he was to receive \$240 and his board. He was injured through the falling of certain staging and scaffolding in and about which he was employed.

The complaint charges that "defendant carelessly and negligently directed plaintiff to work in an unsafe place and carelessly and negligently failed to supply plaintiff with a reasonably safe place within which to perform the work required of him"; that while in its employ and as the result of its negligence, the plaintiff sustained certain personal injuries by which "his wrist was broken, sprained and maimed, and he has been caused to suffer great physical pain and mental anguish, and the said wrist has been permanently maimed and injured and rendered stiff and lame, and plaintiff is wholly unable to use said wrist or his hand in the performance of any work," whereby he has been and is damaged in the sum of \$15,000. The plaintiff also avers that he has not been paid his agreed wages.

In its answer the defendant admits its incorporation and the employment as alleged, but "denies all of the other allegations in said complaint." As a further and separate answer it is alleged that

"Said accident was a pure accident and unavoidable, and one that could not have been prevented by the exercise of any due or reasonable or proper care on the part of this defendant";

that it happened in the territory of Alaska, the laws of which concerning the relations of master and ser-

vant are fully pleaded to the effect that slight contributory negligence will not bar a recovery by the employee where the negligence of the employer was gross in comparison, "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury." The defendant then declares that "all persons or employees working for the defendant engaged in carrying out the details of the work were fellow-servants"; that the plaintiff's accident was the result of his own carelessness and that of his fellow-servants, and not that of the defendant; that the plaintiff "did not use diligence to detect, observe and avoid the dangers, although the dangers and risks were open and obvious"; that the plaintiff thereby contributed to his own injury; and that he assumed all of said risks, hazards and dangers.

The reply admits that the defendant "was engaged in canning salmon at a cannery in Alaska as lessee during the fishing season of 1918," and employed the plaintiff in and about its cannery and warehouse, under the provisions of the law of Alaska as alleged, but denies all other material allegations of the further and separate answer.

As a result of the trial, the jury returned a unanimous verdict in favor of the plaintiff for \$12,000, upon which judgment was entered against the defendant. In due time the defendant filed a motion for a new trial for the following reasons: "(1) misconduct of the jury; (2) excessive damages appearing to have been given under the influence of passion or prejudice; (3) error in law occurring at the trial and excepted to by the defendant."

This motion was overruled in the following judgment entry:

"That the amount of the verdict is excessive and was given under the influence of passion and prejudice.

"That there was no evidence introduced upon the trial of this cause to justify a verdict for any greater sum than \$2,000, and the court affirmatively finds that there is no evidence to justify a verdict in this cause in excess of \$2,000, but the court is of the opinion that, notwithstanding the aforesaid findings of fact, it has no power under the law to set aside said verdict and judgment or to require plaintiff to remit that part of the verdict and judgment herein entered in excess of \$2,000 and denies the defendant's motion for a new trial."

The defendant appeals, contending that "the court erred in refusing to grant its motion for a new trial." No exceptions were taken by either party to the introduction of evidence, to the instructions which were given to the jury, or to the refusal to give any requested instructions. The only question presented on the appeal is whether or not "the court erred in refusing to grant defendant's motion for a new trial."

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Wilbur, Spencer, Beckett & Howell* and *Mr. E. K. Oppenheimer*, with oral arguments by *Mr. H. B. Beckett* and *Mr. Oppenheimer*.

For respondent there was a brief with oral arguments by *Mr. Arthur I. Moulton* and *Mr. William P. Lord*.

JOHNS, J.—In legal effect the defendant now admits its liability, but contends there is no testimony to sustain a verdict against it for \$12,000.

On motion of the defendant, the plaintiff voluntarily submitted to a physical examination, and X-rays of his injuries were taken, photographs of which were introduced in evidence. The defendant did not offer any expert testimony, and there was only one surgeon called as a witness for the plaintiff. He testified that his examination showed that the plaintiff had a comminuted fracture of both the ulna and the radius in his right arm; that the bones were crooked and overlapped, and movement of the wrist and hand was limited; that there was more or less stiffness in the wrist and tendons; that his hand was injured; that he could not do any work which would require much motion of the arm; that his injuries were permanent; and that the arm would never become any stronger or more pliable.

The plaintiff was called as a witness in his own behalf, was seen by the jury, and testified that he lost consciousness when he fell, was taken to the hospital, and remained there for fifteen days, during which time he suffered great pain; that he is now unable to bend his wrist or close his hand; that previous to his employment in Alaska he had worked at different jobs as a laborer, receiving \$3.75 per day, and overtime; and that he had not been able to do any work recently, could not do any heavy work and at the time of the trial was employed in washing dishes.

Pedro Castro, who was working on the same platform, testified that the plaintiff was lying flat on the floor; that his arm was broken, he was cut in three places on the face and in two places on the arm; and that the bones were protruding through the flesh.

The defendant requested numerous instructions, which were given by the court, and the theory of its

case was fully and fairly submitted to the jury. Among others, the court gave the following charge:

"In arriving at your verdict in this cause, you should determine the same solely from the evidence and instructions given you, and should not be influenced by any feelings of sympathy or prejudice, either in favor of or against either of the parties to this action."

The defendant cites and relies upon *Hoag v. Washington-Oregon Corporation*, 75 Or. 588 (144 Pac. 574, 147 Pac. 756), for the authority of this court to reduce a verdict and to render a judgment here for the amount that the plaintiff is fairly and justly entitled to receive. The Hoag case was decided by an opinion of four members of this court, with vigorous dissenting opinions by the other three members, as to the constitutional right of the court to reduce the verdict of a jury. Although it is true that by the majority opinion the verdict of \$30,000 in that case was set aside and a judgment was here entered for the plaintiff for \$14,000, the majority opinion was expressly founded upon the fact that there was prejudicial error in the giving of instructions and that the verdict was based upon such faulty charge. In the instant case there were no erroneous instructions, and the only exception was to the amount of the verdict.

1. Article VII, Section 3 of the Constitution as amended in 1910 (Laws 1911, p. 7), provides:

"In actions at law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be reserved, and no fact tried by a jury shall be otherwise re-examined by any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

The purpose of this amendment was to prohibit courts from setting aside or modifying judgments

founded upon verdicts of juries, where there is no prejudicial error in the record. In this case the jury was properly instructed, and there is no assignment of error except as to the amount of the verdict. Under such circumstances, it was for the jury only to fix the amount of plaintiff's damages, which it did by a unanimous verdict.

2. The Circuit Court was of the opinion that the plaintiff should not recover more than \$2,000, and it is probable that other juries might return a verdict for much less than \$12,000; but the fact remains that the plaintiff was injured, that his disability is permanent, and that in addition to his pain and suffering the use of his arm is greatly impaired. There is no fixed standard as to the amount that the plaintiff should recover for his injuries. That is a question of fact for the jury, and different juries would return different verdicts under the same state of facts.

The record shows that the defendant had a fair trial, and its only exception is to the amount of the verdict. There is nothing in the record to indicate any passion or prejudice. Although in the opinion of this court the amount of damages awarded might be deemed excessive, we cannot affirmatively say that there is no evidence to support it. Under the record in the case, this court is powerless to grant relief. The judgment is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued December 22, 1919, demurrer to alternative writ sustained February 10, 1920.

BENSON v. OLCOTT, GOVERNOR.

(187 Pac. 843.)

States—State Board of Control not Authorized to Sell Bonds to Meet Federal Aid for Highways Offered by Act of 1919.

1. Under Laws of 1917, Chapter 175, Section 2; Id., Chapter 194, Section 38; Id., Chapter 237; Id., Chapter 423, Sections 3, 5-8, 10-12; Laws of 1919, Chapter 159; Id., Chapter 173, Sections 1, 4, 8, 12, 15; Id., Chapter 399, Section 37, and Id., Chapter 403, the state had no authority to sell bonds to equal in amount the federal aid for highways offered under Act Cong. Feb. 28, 1919.

Statutes—Title not Sufficient to Authorize Issuance of Bonds to Meet State Aid.

2. Laws of 1917, page 221, entitled "An act to accept the benefits of" Act Cong. July 11, 1916 (U. S. Comp. Stats., §§ 7477a-7477i), the Shakelford Bill providing for federal aid to states in construction of rural post roads, "and to provide for issuance of bonds * * to meet requirements of said federal statute," etc., held not to authorize issuance of additional bonds to equal the aid given by Act Cong. Feb. 28, 1919, notwithstanding Section 2 of the state statute, providing that such statute should cover "any other aid hereafter furnished by the United States," since to give effect to quoted words would violate Article IV, Section 20, of the Constitution, requiring an act to embrace but one subject, to be expressed in title.

Statutes—When Amendment of Adopted Statute Does not Affect Adopting Statute.

3. The amendment of an adopted statute does not, as between the adopting and the adopted statutes, affect the adopted statute when the adopting statute set out a complete copy of the adopted statute, including its title and date of approval, and then accepts it.

[As to the construction of an adopted statute, see note in *Ann. Cas.* 1917B, 651.]

States—Authority to Sell Bonds must be Given by Clear Language.

4. No officer or board should be adjudged to possess authority to sell bonds obligating the state to pay millions of dollars unless such authority is conferred in clear and express language.

Mandamus—Sale of Bonds to Equal Federal Aid for Highways Discretionary With State Board of Control, and not to be Compelled.

5. Under Act Jan. 20, 1920, providing that state board of control is "authorized, empowered in its discretion" to sell bonds to enable the state to match federal aid for highways available under the Shakelford Bill and under federal act of February 28, 1919, court will not by *mandamus* compel the board to sell the bonds, at least in

absence of allegations of special facts, the selling of the bonds being discretionary with the board.

States—No Authority in State Highway Commission to Sell Bonds to Equal Federal Aid.

6. Under Act Jan. 20, 1920, providing that state board of control is "authorized, empowered in its discretion" to sell bonds to enable the state to match federal aid for highways available and under the Shakelford Bill and under federal act of February 28, 1919, the state highway commission has no authority to sell bonds to meet such federal aid; such authority, even if given by Laws of 1919, page 241, having been withdrawn by act of 1920.

Original proceeding in *mandamus* in Supreme Court.

In Banc.

Upon a petition filed in this court on December 4, 1919, by S. Benson, R. A. Booth and E. E. Kiddle, constituting the State Highway Commission, an alternative writ of *mandamus* was issued directing Ben W. Olcott, as Governor, Ben W. Olcott, as Secretary of State, and O. P. Hoff, as State Treasurer, constituting the State Board of Control, to sell the state's bonds to the amount of \$1,000,000, or to show cause for not doing so. The defendants demurred to the writ.

DEMURRER TO ALTERNATIVE WRIT SUSTAINED.

Mr. George M. Brown, Attorney General, for the demurrer.

Mr. J. M. Devers, contra.

HARRIS, J.—When this special proceeding was brought a doubt existed in the minds of some of the state officials, who were charged with duties connected with the construction of roads, concerning the right and authority to sell bonds in order to secure funds with which to comply with the offer of the federal government to assist in road construction; and the real purpose of the parties to this proceeding was to secure a judicial interpretation of the road legislation which

was in force when the alternative writ of *mandamus* was issued, so that all would know with certainty whether any more bonds could be sold and what officers, if any, possessed authority to sell them.

There are eleven separate statutes which claim our attention. Two of these were enacted by Congress while the remaining nine were adopted by the legislative department of this state. Eight of these nine statutes were enacted in 1917 and 1919, while the ninth was adopted at the special session of the legislature held in January, 1920. Each of these statutes, except the one adopted in 1920, is discussed in one or both of the briefs filed by the litigants, and for that reason we shall refer to all of them. The federal enactments include an act, commonly known as the Shakelford Bill, which was approved July 11, 1916 (U. S. Comp. Stats., §§ 7477a-7477i), and another act which was approved February 28, 1919 (Chapter 69, 40 Stat. 1189), and is entitled:

“An act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes.”

The eight state statutes adopted in 1917 and 1919 include the following: Chapter 175, Laws 1917, commonly known as the Bean-Barrett Bill; Chapter 194, Laws 1917, sometimes referred to as the Motor Vehicle Act; Chapter 237, Laws 1917, known as the Oregon Highway Law; Chapter 423, Laws 1917, usually mentioned as the Six Million Dollar Road Bonding Act; Chapter 159, Laws 1919, an act imposing a license tax on gasoline and other motor vehicle fuels; Chapter 173, Laws 1919, known as the Ten Million Dollar Road Bonding Act; Chapter 399, Laws 1919, an act licensing motor vehicles; and Chapter 403, Laws 1919, an act “to further define and protect the state highway fund.”

By the terms of the Shakelford Bill the federal government offered to assist the several states in the construction of rural post roads and to co-operate with the states and with the counties of each state in the construction of forest roads and trails. The sum of \$75,000,000 was appropriated to be expended during the period of five years in the construction of rural post roads. Any state accepting the terms of the act was entitled to receive its benefits. In effect the federal government agreed to pay one half of the cost of construction if the state obligated itself to pay the other half. The sum of \$75,000,000 was divided into five parts, and each of these parts was allotted to a designated year in the five year period, and to each of the states accepting the terms of the act a specified share was apportioned so that upon compliance with the provisions of the Shakelford Bill the amount so apportioned to such state is made available to that state for road construction. Any part of the amount apportioned to a given state which remains unexpended at the end of the period during which it is available for expenditure, is lost to the state to which it was originally apportioned, and is then re-apportioned in the same way as if it were apportioned for the first time. The Shakelford Bill further authorizes the Secretary of Agriculture to enter into co-operative agreements with the states and counties for the construction of forest roads and trails upon a basis equitable to both the state or county and the United States, and for that purpose the sum of \$10,000,000 was appropriated for expenditure during the period ending with June 20, 1926. There was originally apportioned to Oregon as its share under the Shakelford Bill the sum of \$1,180,310.55 for the construction of rural post roads and the sum of \$638,970 for the construction of forest roads,

making a total of \$1,819,280.55; but, due to the fact that some of the states did not accept the offer made by the Shakelford Bill, the amount available to the states which did accept the offer was enlarged, and this state secures as its share under the Shakelford Bill as originally enacted the sum of \$1,181,416.50 for rural post roads and \$638,970 for forest roads, or a total of \$1,820,386.50.

The federal act which was approved February 28, 1919, purports to amend certain sections of the Shakelford Bill, and for the purpose of carrying out the provisions of the Shakelford Bill as amended, the act of 1919 enlarges the appropriation for the construction of rural post roads and materially increases the allotments for the fiscal years ending in 1919, 1920 and 1921. The federal act of 1919 also enlarges the appropriation for the construction of forest roads under co-operative agreements between the Secretary of Agriculture and the proper officials of the several states. In addition to the total sum of \$1,820,386.50 which is payable to Oregon under the terms of the Shakelford Bill as originally enacted, this state is entitled by force of the provisions of the federal act of 1919 to the further sum of \$3,150,761.77 for rural post roads and the further sum of \$638,970, for forest roads, or a total additional sum of \$3,789,731.77. In other words, the grand total of the federal funds set aside by the Shakelford Bill as originally adopted in 1916 and as subsequently amended in 1919 for aid in road construction in this state is \$5,610,118.27.

The State of Oregon, through its legislature, accepted the terms of the Shakelford Bill by enacting Chapter 175, Laws 1917, otherwise known as the Bean-Barrett Bill. By the terms of Section 2 of this act, the officers having control of the state highways are

required, out of the moneys received in the highway funds of the state each year, first to set aside a sufficient amount to comply with the requirements of the Shakelford Bill, and if there is any deficiency in the highway fund for such purpose, then the State Board of Control is "authorized, empowered and directed each year during the next five years" to sell a sufficient amount of the bonds of the state

"to raise enough money which, taken together with any money available from appropriations from other funds of the state of Oregon, if any there be, to equal the amount required of the state of Oregon in order to fully meet the requirements, conditions and provisions" of the Shakelford Bill; "provided, however that such bonds shall not be issued unless necessary to enable the state of Oregon to avail itself of the Federal aid as provided hereinabove, or any other aid hereafter furnished by the United States."

Pursuant to the authority granted in the Bean-Barrett Bill, the State Board of Control has sold bonds aggregating \$1,200,000, and whenever additional bonds to the amount of \$620,386.50 are sold then the State Board of Control will have sold a total of \$1,820,386.50, or the full amount available to this state under the Bean-Barrett Bill as originally enacted. The State Highway Commission has requested the Board of Control to sell additional bonds to the amount of \$1,000,000, since that sum is required in order to secure to this state its full share of the moneys which have been apportioned to it under the Shakelford Bill and the amendatory act of 1919.

Chapter 194, Laws 1917, a motor vehicle act, provides for the collection of license fees from owners of motor vehicles. This statute is of interest only to the extent that it furnished possible funds which could be used to meet the requirements of the Shakelford Bill.

By the terms of Section 38, any balance of fees remaining after paying certain expenses became available on December 31st of each year for the purpose of matching the moneys apportioned to Oregon by the Shakelford Bill. At the next session of the legislature, however, another motor vehicle act, Chapter 399, Laws 1919, was enacted, and this statute provides for the licensing of motor vehicles and disposes of any balance remaining after the payment of expenses. Chapter 194, Laws 1917, is further affected by Chapter 423, Laws 1917, for by Section 12 of the latter statute any balance remaining after the payment of certain expenses may be used by the State Highway Commission

“in payment of the interest and principal as same shall become due upon bonded indebtedness of the State of Oregon, contracted for road purposes under the provisions of this Act or the provisions of Chapter 175, Laws 1917.”

Chapter 237, Laws 1917, which became effective on February 19, 1917, and is known as the Oregon highway law, creates the State Highway Commission, again assents to the Shakelford Bill, requires the State Tax Commission each year to make a state levy equal to one fourth of a mill on each dollar of assessable property, directs that this tax when collected “shall with any and all road funds, become a part of the state highway fund,” and apportions the highway fund by directing the State Highway Commission to set aside from the highway fund: (1) An amount sufficient for the salaries and expenses of the state highway department; (2) a sufficient amount to cover the cost of operating and maintaining state highways which have been constructed; (3) sufficient funds to meet “the federal government appropriation and requirements” of the Shakelford Bill “or any federal appropriation

that may be hereafter provided"; and (4) "the remainder shall be used for any purposes of this act."

Chapter 423, Laws 1917, known as the Six Million Dollar Road Bonding Act, was submitted to the people and approved by them at an election held June 4, 1917. The State Highway Commission is by Section 3 of this act authorized to issue bonds "for the purpose of carrying out the provisions of this act in an amount not exceeding \$6,000,000." Section 5 prescribed that the moneys arising from the sale of these bonds shall be deposited in the state treasury to the credit of a special fund "which shall be used in carrying into effect the provisions of this act." Section 6 designates certain roads as hard surfaced roads; and Section 7 names certain highways as post roads. Section 6 opens by declaring that the highways described in Sections 6 and 7 "are hereby determined to be the highways of first importance to the general public of the State of Oregon," and by the next sentence "it is hereby determined" that eight several highways should be permanently constructed and finished with a hard surface. Section 8, after enumerating five different roads as forest roads, declares that "the funds with which to pay the portion of the expense of construction of said post roads * * payable by the State of Oregon, shall be secured from the sale of bonds as is provided in" Chapter 175, Laws 1917. Section 10 is to the effect that all funds required for finishing and hard surfacing the enumerated hard surface roads "shall be derived from the sale of said bonds, provided for in Section 3." The State Highway Commission is directed by Section 11 to

"pay the interest upon said bonds as the same shall become due, from any funds subject to its control, from whatever source the same may come, and the payments upon the principal of said bonds, as the same shall be-

come due, shall be paid by the State Highway Commission from any funds within its control, without regard to the original of said funds."

Chapter 159, Laws 1919, which became effective February 25, 1919, provides for a license tax on gasoline and other motor vehicle fuels.

Chapter 173, Laws 1919, known as the Ten Million Dollar Road Bonding Act, became effective on February 26, 1919. Section 1 of this act declares that "the state highway fund shall hereafter consist of all moneys and revenues derived": (1) under Chapter 423, Laws 1917; (2) under Chapter 175, Laws 1917; (3) under Chapter 339, Laws 1913 (this chapter was expressly repealed by Section 17, Chapter 237, Laws 1917); (4) from the one-fourth mill tax provided for in Chapter 237, Laws 1917; (5) from all moneys accruing from licensing motor vehicles and chauffeurs and by law authorized to be diverted for road purposes; (6) from moneys derived from license tax levied on gasoline or motor vehicle fuels; (7) from the moneys derived "under the provisions of this act and acts amendatory thereof"; (8) from all moneys received from all other sources which by law are diverted for the improvement of the roads of the state; and (9) from the moneys derived from the operation of all laws which are hereafter enacted, and direct that moneys shall be used in the construction of roads. Section 4 authorizes the State Highway Commission

"during the next five years, to sell in addition to the bonds heretofore authorized, the bonds of the State of Oregon as hereinafter provided, in an amount not to exceed the sum of ten million dollars, (\$10,000,000)."

Section 8 states that

"the money arising from the sale of each issue of bonds shall be deposited in the state treasury to the credit of

the state highway fund, which shall be used in carrying into effect the provisions of this act."

This section further provides that "the moneys derived from the sale of the bonds herein provided for shall be disbursed as follows": (1) Seventy-five per cent shall be used in the construction of pavement and the betterment of hard surfaced highways designated in Chapter 423, Laws 1917; and (2) the remaining 25 per cent shall be expended in the discretion of the State Highway Commission (a) in the construction of other roads of any class included in the highway system set forth in Chapter 423, Laws 1917, and (b) in preparing and assisting counties in preparing grades, bridges and culverts. It is also provided, however, that "nothing contained in this section shall prevent the highway commission from expending any of the said highway fund in carrying out the provisions of Section 15 of this act." Section 12 provides that any unexpended balance of fees received under Chapter 194, Laws 1917, remaining after the payment of expenses incurred in carrying out the provisions of the act and "remaining after the appropriation of so much of said funds as has been or shall hereafter be made to make effective and carry out the provisions" of Chapter 423, Laws 1917, shall be transferred to the highway fund to be expended under the jurisdiction of the State Highway Commission in payment of interest and principal upon the bonded indebtedness of the State of Oregon contracted for road purposes "under the provisions of this act and prior highway legislation." Section 15 authorizes the State Highway Commission "to use any moneys derived under the provisions of this act and to meet any sum or sums heretofore or hereafter apportioned to the State of Oregon by federal enactment for the construction, betterment or im-

provement of post roads, forest roads, and other permanent highways";

and the commission is authorized to do any act necessary to meet the requirements of the United States "and the officers acting under such federal statute."

Chapter 399, Laws 1919, is a motor vehicle act, and became effective March 4, 1919. This act provides for licensing motor vehicles and chauffeurs. Section 37 provides that the moneys remaining after the payment of the cost of administering the act shall be disposed of as follows: Three fourths shall be transferred to the state highway fund "for such purposes as are provided by law" and one fourth shall be remitted to the county treasurers.

Chapter 403, Laws 1919, is entitled an act "to further define and protect the state highway fund." This statute declares that nothing contained in Chapter 173, Laws 1919, "shall be construed to prevent issuance and sale of bonds of the State of Oregon for the purpose of meeting the conditions of the act of Congress set forth" in Chapter 175, Laws 1917, "but said bonds shall be issued as in said chapter provided, and no part of the state highway fund provided for" in Chapter 173, Laws 1919, "shall be used to meet any of said federal appropriation other than such portion of said fund as shall be derived from the sale of said bonds issued under the provisions of said Chapter 175."

The act of 1920 will not be discussed until the other statutes have first been disposed of.

1. The foregoing synopsis of state legislation enacted in 1917 and 1919 reveals the sources from whence, at the time of the commencement of this proceeding, came all the moneys available for road purposes, and shows what general or specific directions have been given by the legislative department concerning the ex-

penditure of those moneys. Chapter 173, Laws 1919, the Ten Million Dollar Road Bonding Act, gathers up all the road moneys and places them in one fund, called the state highway fund. Although all the road moneys are collected together and deposited in a single fund, yet every dollar of that fund is traceable to the source from which it came. In most instances the statute which supplies the source also gives specific directions concerning the expenditure of the moneys produced from that source, and sometimes, too, other statutes give different directions concerning the disposition of those same moneys. We need not notice any of the moneys which admittedly could not, as the law stood on December 4, 1919, be used for matching federal aid. In other words, we are not now concerned with the moneys which, for example, were required to be used for hard surfaced roads, nor with the moneys which were required to be used for paying the salaries and expenses of the State Highway Department; and hence we need not examine the phraseology of any parts of any statutes which deal with like moneys. At present our inquiry is confined to moneys available for federal aid. At this point in the discussion we may eliminate some of the state enactments from further consideration and by so doing concentrate our view upon such remaining statutes as are essential to a solution of the problem submitted to us.

Presumably there are no funds now remaining in the state highway fund which originated in Chapter 194, Laws 1917; and if there were any such funds they would not be available for matching federal aid, notwithstanding the fact that the act itself provides that, if the state accepts the Shakelford Bill, any balance in the "motor vehicle fund" on December 31, "shall be used for the purposes thereof." Section 2, Chapter

423, Laws 1917, directs that any unexpended balance of fees received under Chapter 194, Laws 1917, shall be expended under the jurisdiction of the State Highway Commission in payment of the interest and principal upon bonded indebtedness contracted for road purposes under the provisions of Chapter 423, Laws 1917, or Chapter 175, Laws 1917; and moreover, Section 12, Chapter 173, Laws 1919, declares that any surplus remaining from Chapter 194, Laws 1917, after paying the expenses shall be expended in payment of the principal and interest as the same shall become due upon bonded indebtedness contracted for road purposes under the provisions of Chapter 173, Laws 1919, "and prior highway legislation." We may therefore dismiss Chapter 194, Laws 1917, from further notice.

Chapter 399, Laws 1919, the Motor Vehicle Act now in force, directs that three fourths of the balance remaining after paying the expenses of administering the act shall be transferred to the state highway fund "for such purposes as are provided by law"; and since we must look to some other law to ascertain the "such purposes as are provided by law," we may with propriety dismiss Chapter 399, Laws 1919, from further notice.

Chapter 159, Laws 1919, merely provides for a license tax on motor vehicle fuels, without giving any specific directions concerning the expenditure of the funds. While such of these moneys as are diverted for road purposes are drawn to the state highway fund by force of Chapter 173, Laws 1919, still we need not longer consider Chapter 159, Laws 1919, and may now discard it.

We shall assume, without deciding, that Chapter 237, Laws 1917, stands alone, and that it is not in any particular affected by any other statute except to the extent that the tax levied under its authority is carried into the state highway fund by means of Chapter 173,

Laws 1919. If we consider Chapter 237, Laws 1917, by itself, we see that this chapter takes the one fourth of a mill tax and any other moneys which come into the fund there provided for and out of them first pays the salaries and expenses of the State Highway Department, and, if there is a balance remaining, it is next applied to the cost of maintaining state highways which have been improved, and then, if there is a surplus, it may be used to meet the requirements of the Shakelford Bill "or any federal appropriation that may be hereafter provided." It is not contended that there is any surplus available under the terms of this act; but, upon the contrary, it is asserted on the one side and admitted on the other that there are no moneys now in the treasury available for matching federal aid, and that the need of moneys for meeting the requirements of the federal government is present and urgent. Even though it be assumed that some moneys may be available at some time in the future, those moneys could furnish no help at this moment when help is needed. For these reasons we may eliminate Chapter 237, Laws 1917, from further consideration.

Chapter 423, Laws 1917, does not relieve the emergency. This statute, it is true, outlines a road program by designating certain roads as hard surfaced roads, by naming others as post roads and by classifying others as forest roads. This statute, it is true, empowers the State Highway Commission to issue bonds to the amount of \$6,000,000 and directs, by the terms of Section 5, that the funds derived from the sale of those bonds shall be deposited in the state treasury "to the credit of a special fund, which shall be used in carrying into effect the provisions of this act." But it is also true that this statute further provides in Section 8, that—

“The funds with which to pay the portion of the expense of construction of said post roads and forest roads payable by the State of Oregon, shall be secured by the sale of bonds as is provided for in House Bill No. 21 (Chapter 175, Laws 1917) passed by the present legislative session.”

Chapter 423, Laws 1917, may also be eliminated from further discussion.

By a process of elimination five of the statutes have been laid aside, and only three of the statutes in force on December 4, 1919, now remain for consideration. These three remaining statutes include Chapter 175, Laws 1917 (the Bean-Barrett Bill), Chapter 173, Laws 1919 (the Ten Million Dollar Road Bonding Act), and Chapter 403, Laws 1919. The legislation enacted in 1917 and 1919 does not authorize the sale of bonds to take advantage of the federal aid provided for by the federal act of February 28, 1919, unless it can be said that the authority is conferred by one or more of these three state enactments.

2. The State Highway Commission argues that Chapter 175, Laws 1917, contains language sufficiently broad to authorize the State Board of Control not only to issue sufficient bonds to meet the offer of the Shakelford Bill as originally enacted, \$1,820,386.50 in amount, but also to issue bonds in the further sum of \$3,789,731.77 which is the total amount of the additional aid offered by the federal act of February 28, 1919. The State Board of Control argues that its authority to issue bonds under Chapter 175, Laws 1917, is limited to \$1,820,386.50, and that, having already sold bonds aggregating \$1,200,000, it cannot during the remainder of the period specified in Chapter 175 sell any more bonds except to the amount of \$620,386.50. The State Board of Control suggests, rather than contends, that the State Highway Commission has been granted au-

thority by the provisions of Chapter 173, Laws 1919, known as the Ten Million Dollar Road Bonding Act, to sell whatever bonds may be necessary in order to match the additional appropriation of \$3,789,731.77 available under the terms of the federal act of February 28, 1919. The argument of the plaintiff is based upon the following words found in Section 2 of Chapter 175, Laws 1917: "or any other aid hereafter furnished by the United States." This argument made by the State Highway Commission cannot prevail, for the reason that it comes in conflict with Article IV, Section 20, of the state Constitution, which reads as follows:

"Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Turning now to the title of Chapter 175, Laws 1917, we find that it is entitled:

"An act to accept the benefits of the Act passed by the Sixty-fourth Congress of the United States, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' and to provide for the issuance of bonds of the State of Oregon to raise such money as may be required to meet the requirements of said Federal statute, and to authorize the State Board of Control to take such action and perform such duties as may be necessary to meet the requirements of said Federal Act and Federal officials acting under said Act."

The Shakelford Bill appropriated a definite sum of money to be apportioned among the states, and although the amount available to a given state might be increased from year to year by reason of the failure

of some other state to meet the requirements of the act, yet the total amount available to all the states was certain, and the amount available to Oregon was at least approximately certain. The title of Chapter 175, Laws 1917, speaks of but one subject. The title declares that the act is one to accept the benefits of the Shakelford Bill and to provide for the issuance of bonds to meet the requirements "of said federal act, and federal officials acting under said act." The title speaks of only one federal act and that act is the Shakelford Bill. The title was, in effect, notice to every member of the legislature that, if he voted for the bill, he voted to authorize the State Board of Control to issue bonds in an amount sufficient to enable this state to receive its share of the fixed sum of money appropriated by the Shakelford Bill, but there was no notice whatever that a vote for the Bean-Barrett Bill was a vote to authorize the Board of Control to issue bonds to meet the requirements of some other federal act. The title of the Bean-Barrett Bill does not say that bonds can be issued to match any or all federal aid then or afterwards offered, but the title is specific and names only one offer of federal aid. The title was notice to every member of the legislature that a vote for the Bean-Barrett Bill was a vote to authorize the issuance of bonds amounting to \$1,820,386.50 to meet the requirements of the Shakelford Bill only, and it was not notice that such a vote was also a vote to authorize the issuance of additional bonds amounting to \$3,789,731.77 to meet the requirements of some other federal statute yet to be enacted. The title speaks of present aid only, and makes no reference to future aid. It is true that the Constitution does not require the title of the act to be a copy of the body of the bill, but it is manifest that the title contains no

notice whatever, not even a hint, that the body of the bill contains in it somewhere a clause referring to "other aid hereafter furnished by the United States." To give effect to the words last quoted would be to violate Article IV, Section 20, of the Constitution as that section is construed in *Clayton v. Enterprise Electric Co.*, 82 Or. 149, 156 (161 Pac. 411).

Treating the federal aid offered by the act of February 28, 1919, as "other aid" or additional aid, it is manifest that the Bean-Barrett Bill does not authorize the sale of bonds to match such "other aid" for the reason that the title of the Bean-Barrett Bill is not broad enough to embrace such "other aid," and therefore does not support that part of the body of the act. This conclusion, however, does not completely dispose of the contentions made by the plaintiff, for it is further urged that the Bean-Barrett Bill, by adopting the Shakelford Bill, as it existed in 1917, also adopted any changes that were afterwards made in it by amendment, and that, therefore, since the federal act of February 28, 1919, amends the Shakelford Bill, the amendment is adopted along with the Shakelford Bill.

3. The Bean-Barrett Bill sets out a complete copy of the Shakelford Bill, including its title and the date of its approval, and then accepts it. The Bean-Barrett Bill specifically designates the single law which it adopts, and as recently held in *State v. Ganong*, 93 Or. 440 (184 Pac. 233, 235), the amendment of an adopted statute does not, as between the adopting and the adopted statutes, affect the adopted statute when the adopting statute uses the form of reference employed by the Bean-Barrett Bill. Chapter 175, Laws 1917, does not authorize the Board of Control to issue bonds to match the federal aid offered by the act of February 28, 1919.

We now turn to Chapter 173, Laws 1919. This chapter as already pointed out gathers all the road moneys into a single fund; it provides in Section 4 for the sale of additional bonds to the amount of \$10,000,000. It apportions and gives directions in Section 8 for the expenditure of the proceeds derived from the sale of those bonds, and also declares that "all of the state highway fund not otherwise specifically applied" shall be expended in the discretion of the State Highway Commission; and this section concludes by saying that "nothing contained in this section shall prevent the highway commission from expending any of said highway fund in carrying out the provisions of Section 15 of this Act." Turning to Section 15, the State Highway Commission is "authorized, empowered and directed to use any moneys derived under the provisions of this act" to meet any federal aid apportioned to Oregon. In other words, in despite of all the care and caution used in apportioning the "moneys derived under the provisions of this act" unrestricted authority is finally given to use "any" of those moneys to match federal aid "heretofore or hereafter apportioned" to Oregon. The language found in Chapter 173, Laws 1919, makes it fairly clear that, if moneys have already been "derived under the provisions of this act" and are actually in the state highway fund, those moneys may be used to match federal aid; but it is not so clear that the statute contemplates that any of the bonds therein provided for may be sold for the express and primary purpose of raising funds with which to match federal aid. Because of the statute enacted in 1920, and to which reference will subsequently be made, we do not find it necessary to determine whether the State Highway Commission is authorized by Chapter 173, Laws 1919, when standing

alone, to sell bonds for the purpose of raising funds to match federal aid. Chapter 403, Laws 1919, undoes in part at least what had been done by Chapter 173, Laws 1919, for the former declares that "no part of the state highway fund provided for" in Chapter 173, Laws 1919, "shall be used to meet any of said federal appropriation other than such portion of said fund as shall be derived" from the sale of bonds under the Bean-Barrett Bill. It may be that the legislature intended by the enactment of Chapters 173 and 403, Laws 1919, to require all federal aid available under the Shakelford Bill to be met exclusively with bonds sold under the Bean-Barrett Bill, and at the same time to permit bonds to be sold under Chapter 173, Laws 1919, for the purpose of meeting subsequent federal legislation offering aid. If such were the intention of the legislature, it is very doubtful whether appropriate language was employed to express that intention so far as it relates to the sale of bonds to meet subsequent federal aid. If such had been the intention of the legislature, it would not have been difficult clearly to express it. It is clear, that the State Board of Control has authority to sell bonds under the Bean-Barrett Bill to meet the requirements of the Shakelford Bill; but it is doubtful whether the State Highway Commission can sell bonds to match federal aid offered under the act of February 28, 1919.

4. Counsel have outlined a course of argument which, it is suggested rather than contended, may possibly support the conclusion that Chapters 173 and 403, Laws 1919, when construed together, empower the State Highway Commission to sell bonds to match federal aid offered under the act of February 28, 1919. It is sufficient to say of this argument, so suggested, that while it is ingenious, it lacks persuasiveness. No

officer or board should be adjudged to possess authority to sell bonds obligating the state to pay millions of dollars unless such authority is conferred in clear and explicit language.

The legislature recently convened in a special session, which was held after the commencement of this proceeding, but before the hearing of the case, enacted a measure which has partially, if not largely, rendered the discussion of prior state legislation academic rather than practical. A bill for an act, known as House Bill No. 74, was passed by the House on January 16th, and by the Senate on January 17, 1920, and became an effective law on January 20, 1920, the date of its approval by the Governor. This statute again avows the state's acceptance of the Shakelford Bill, and it also expressly accepts the federal act of February 28, 1919. Section 2 of this act is as follows:

"The state highway commission of (or) officers having control of the state highways of the state of Oregon shall, out of the money received in the state highway funds of the state of Oregon each year from any and all sources, first set aside, if deemed necessary or expedient, a sufficient amount to comply with the terms of said federal acts and any other aid hereafter furnished by the United States for the construction of roads and highways or to match such federal aid; or if by reason thereof there will be any deficiency in said state highway funds in the judgment of such state highway commission or officers having control of the state highways and the said funds by reason thereof will be insufficient to take care of the construction of roads and pay interest on outstanding bonds in any such year or years, or if such state highway commission shall deem it necessary and expedient and for the best interests of the state of Oregon, to match and secure such federal aid under the provisions of said statutes of the United States hereinbefore mentioned or other federal aid hereafter furnished by the United States to the

state of Oregon for roads, then the state board of control of the state of Oregon is hereby authorized, empowered in its discretion each year to sell the bonds of the state of Oregon in such denomination as in its judgment will be most marketable and in an amount sufficient to raise enough money to equal the amount required of the state of Oregon, in order to fully meet the requirements, conditions and provisions of said federal statutes and the federal officials operating under said statutes or any other aid hereafter furnished by the United States for the construction of roads and highways."

5, 6. It will be observed that the language of the statute is that the State Board of Control is "authorized, empowered in its discretion" to sell bonds. The bill as originally introduced read thus: "Authorized, empowered and directed"; but in the process of its enactment the bill was changed by substituting the words "in its discretion" for the words "and directed." The statute as it now reads authorizes but does not compel the Board of Control to sell bonds. The Board of Control has authority under this statute "in its discretion" to sell sufficient bonds to enable the state to match federal aid available under the Shakelford Bill and under the federal act of February 28, 1919, but this court cannot, at least on the facts presented here, by a peremptory writ of *mandamus* compel the State Board of Control to sell bonds. The board has ample authority to sell bonds, but the law gives the board the right to exercise its discretion in determining whether it will use that authority. Even though it be assumed that Chapter 173, Laws 1919, authorized the State Highway Commission to sell bonds to meet federal aid, nevertheless it is plain that the act of 1920 withdraws that authority, and that the legislature in-

tended that all bonds to meet federal aid should be sold pursuant to the act of 1920.

In view of the language found in the act of 1920 it is difficult to conceive of a situation which would authorize the issuance of a writ peremptorily commanding the State Board of Control to sell bonds. If, however, such a situation is possible it is not presented here; for the record before us cannot support an order for a peremptory writ of *mandamus*. The demurrer to the alternative writ is therefore sustained.

DEMURRER SUSTAINED.

Argued at Pendleton October 28, affirmed December 2, 1919, rehearing denied February 17, 1920.

BESSLER v. POWDER RIVER GOLD DREDG. CO.

(185 Pac. 753; 187 Pac. 621.)

Adverse Possession—"Claim of Right"; "Claim of Title"; "Claim of Ownership."

1. The terms "claim of right," "claim of title," and "claim of ownership," when used to express adverse intent, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right.

Adverse Possession—Possession of Vendee Under Contract.

2. The possession of a vendee of land under contract to purchase, whether oral or written, after payment of the entire purchase price, is presumptively adverse to that of his vendor from the time that such payment was made, and such possession is not prevented from being adverse by his knowledge of a defect in the title or a subsequent demand for a deed.

Adverse Possession—Possession Under Invalid Contract to Purchase.

3. Possession under an invalid contract to purchase land, if continued the requisite period after payment of the agreed price, will ripen into title, and such title will be equally as effective as if the same had been acquired under a valid contract.

Adverse Possession—Legal Owner to Take Notice of Extent of Claim.

4. An owner of premises is bound to take notice of the nature and extent of the possession by a claimant.

Adverse Possession—Continued Possession as Constituting Prima Facie Case.

5. Continued, unexplained possession of land for a long period of time is evidence that the possession is adverse and makes out a *prima facie* case, and, until rebutted by some satisfactory evidence, is conclusive as to the nature of the possession.

Adverse Possession—Title Acquired by Possession for Ten Years.

6. Title by adverse possession is acquired by the open, notorious, exclusive and uninterrupted antagonistic possession under a claim of ownership of land belonging to another for the full period of ten years by a person whose claim of ownership would not be in violation of some contractual duty owing by him to the owner of the land, such as a tenant holding under a lease or the like.

Appeal and Error—Rulings on Prior Appeal Law of Case.

7. Where plaintiff's pleadings were held sufficient on a former appeal to entitle him to sustain his claimed title to land, the ruling upon such former appeal became the law of the case, and on a subsequent appeal it could not be said that a judgment for plaintiff was improper, where the evidence supported the allegations of plaintiff's pleadings.

Adverse Possession—Possession of Purchaser from Vendee Adverse to Vendor.

8. After a purchaser from a vendee has paid his purchase money, his continued possession is deemed adverse to the vendee, and consequently to the original vendor, although the latter has not been paid.

Adverse Possession—Effect of Releasing Vendee by Purchaser from Him.

9. Where purchaser from vendee paid his purchase money and took possession and vendee found that he could not get a deed from the original vendor, and the purchaser released the vendee from his obligation to secure a conveyance on payment of a certain sum to him with the understanding that it would not affect the purchaser's title to the land, such release did not prevent the possession of the purchaser from being adverse as against the original vendor.

Trespass—Damages not Excessive.

10. In an action for possession of land and damages, defendant having torn down buildings and dredged the land for gold, obtaining about \$20,000 worth of gold, a verdict for \$15,000 held not excessive as a matter of law, in view of the evidence and the fact that there was no exception to the instructions on the measure of damages.

ON PETITION FOR REHEARING.**Appeal and Error—Verdict Conclusive on Appeal.**

11. In view of Article VII, Section 3, of the Constitution, where there is competent evidence to sustain the verdict, disputes as to different conclusions of fact which might reasonably be drawn from the circumstances of the case by the triers of the facts are set at rest by the verdict.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

This action was commenced in the Circuit Court of Baker County, October 27, 1916. The plaintiff seeks to recover possession of the strip of land containing a fraction over three acres described in his complaint, and also damages in the sum of \$3,000 for injury done to the premises by defendant and for alleged wrongful ousting of plaintiff and for depriving him of possession thereof.

Plaintiff bases his claim of title to the premises on the ground of adverse possession continued by himself and his predecessors in interest for the full period of ten years. In a supplemental complaint plaintiff further alleges that since the commencement of the action defendant wrongfully entered upon the premises, dredged and mined therefrom all the gold deposits and entirely destroyed the property so that the same is unfit for any use whatever; and plaintiff by reason of these acts sustained further damage in the sum of \$12,000 and he therefore demands judgment as in the original complaint and for the sum of \$12,000 in addition thereto.

In its answer to the complaint and the supplemental complaint, defendant denies that plaintiff is the owner of the premises, or that he or his grantors or predecessors in interest ever were owners of the premises in controversy, and denies all the allegations of wrongful entry and all the allegations upon which plaintiff bases his claim for damages, and ownership of the premises.

By way of a first separate defense defendant alleges in its answer that at the time of the commencement of the action and for a long time prior thereto, one R. W. Derby was the owner in fee and in possession of the premises in controversy. Secondly, that plaintiff is

estopped and precluded from now claiming title to the property described in his complaint for the reason that the title to the same property was heretofore the subject matter of adjudication in an equity suit between the same parties and their privies. Plaintiff by his reply admits that, while the suit in equity was brought and the matters therein alleged as now claimed by defendant in this action, and that a decree was therein entered as pleaded by defendant, he avers in substance as follows: That the decree in the equity suit in effect determined that the possession of plaintiff and his grantors could not have been and was not adverse prior to March, 1906, and that therefore plaintiff now alleges that when the suit was brought ten years of adverse possession had not elapsed, so that the claim of title on the ground of adverse possession, as now claimed, had not matured and therefore could not be litigated or determined in that decree, and that after the commencement of that suit and during the pendency thereof and after the same was determined on appeal the plaintiff remained in adverse, open, hostile, notorious and continuous possession of the premises, until long after the full period of ten years from and after March, 1906, had expired, and that by such adverse possession he has now matured the claim and acquired title by such adverse possession.

This case is appealed to this court for the second time, the first decision being found in 90 Or. 663 (176 Pac. 791, 178 Pac. 237). A suit to quiet title to the same parcel of land involved in this case has also been before the court: *Bessler v. Derby*, 80 Or. 518 (157 Pac. 791). As a result the legal questions involved are well settled. It is a case, however, of considerable importance, and merits a discussion of the legal questions involved.

The record tends to disclose the following facts: In 1905 the partnership consisting of P. J. Brown, Frank Geddes, Fred Phillips and J. B. Stenoff purchased the tract of land in controversy to be used by them as the location for their slaughter-house and slaughter-pens. The consideration agreed upon was \$250, payment of which was completed according to the testimony in this case and as admitted by appellant, in March, 1906. Immediately upon entering into the agreement they took possession of the premises, built a fence inclosing the same and erected thereon a slaughter-house, ice-house and other necessary buildings to prepare the premises for slaughter-house purposes. At that time these parties were engaged in the butcher business at Sumpter, Oregon, and conducted their business under the name of the Sumpter Meat Company. In March, 1906, because of some financial differences J. B. Stenoff sold his interest in the firm and disappeared. The partnership took possession of the premises in the latter part of the year 1905. Their possession continued from that time until about May, 1906, when W. P. Smith and Thomas Mack entered into negotiations with them for the purchase of the butcher business and the property owned by them at Sumpter, Oregon. These negotiations culminated in Smith and Mack going to Sumpter, looking over the property and making an inventory of the same. In this statement of property owned by Brown, Phillips and Geddes and which they proposed to sell to Smith and Mack the premises in controversy were listed. Smith and Mack after making the inventory and looking over the property at Sumpter returned to Baker. The parties then agreed upon the price to be paid for the business and the property, which Smith and Mack paid in full at that time. Brown, Phillips and Geddes believed that they owned

the real premises in controversy, and so represented to Smith and Mack, for the reason that they had purchased the same from the Sumpter Lumber Company and paid the purchase price. Smith and Mack, relying on that representation, paid for it, and the deal was closed. At this time one of the partners informed Smith that when he returned to Sumpter to take charge of the property and the business purchased he should see Mr. W. B. Riley, who was at that time in charge, and that Riley would see to the preparation of a deed to the premises which later would be executed by Brown, Phillips and Geddes. On May 1, 1906, Smith went to Sumpter and in behalf of himself and Mack took possession of the land which they had purchased, as well as the business. Shortly thereafter he went to see Mr. Riley as he had been instructed. Riley informed him that he had not been able to find a deed to the premises among the papers, and suggested that they should see Blanchard the representative of the Sumpter Lumber Company, who had sold the property, and find out about the deed. A few days later they saw Blanchard, and he informed them that the deed to the premises had not been executed, but stated that the premises had been purchased by Brown, Phillips and Geddes, that all of the purchase money had been paid prior to that time, and that a deed would be made within a very short time, and stated that inasmuch as Brown, Phillips and Geddes had sold the property to Smith and Mack he would have the deed made to Smith and Mack. Several times thereafter Smith spoke to Blanchard about the deed and always received from him the assurance that a deed would be executed in the near future, and he had no intimation from Blanchard or anyone else that there was any question as to the validity of the contract of sale or that the Sumpter

Lumber Company would refuse to execute a deed in accordance with the contract. It had received the money and kept it with full knowledge of what it was paid for. In 1909, Smith bought Mack's interest in the property. At that time Smith and Mack insisted that a deed should be furnished them in accordance with their contract. Brown, Phillips and Geddes paid to Smith and Mack the sum of \$500 with the understanding that the payment of that sum of money would not in any manner affect the title of Smith and Mack to the property. Smith and Mack's possession continued from May, 1906, until Smith bought out Mack in 1909, and Smith's possession continued thereafter until he sold to the plaintiff in June, 1912, and the plaintiff's possession continued until July 18, 1916. The possession of Brown, Phillips and Geddes and their successors in interest from March, 1906, was not disturbed in any manner until July 18, 1916. On that date, the defendant, Powder River Gold Dredging Company, commenced suit and enjoined the plaintiff from in any manner interfering with the premises. After securing this injunction the defendant immediately tore down and burned up plaintiff's buildings and fences. Plaintiff then commenced this action. After which and while the case was pending, the defendant dredged the entire premises, rendering them of no possible use or value. The last dredging was done in January, 1917. The plaintiff then filed a supplemental complaint alleging the dredging out and destruction of the premises, and asking for \$12,000 additional damages. During the trial Mr. Derby, the manager of the defendant corporation, stated upon the witness-stand that the defendant company had extracted from the premises in controversy gold of the value of \$20,184. The jury found that the plaintiff was the owner in fee of the premises, and re-

turned a verdict for the full amount prayed for, namely, \$15,000; and from this judgment the defendant has appealed.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Thomas H. Breeze* and *Messrs. Clifford & Correll*, with oral arguments by *Mr. Breeze* and *Mr. Morton D. Clifford*.

For respondent there was a brief with oral arguments by *Mr. John L. Rand* and *Mr. A. A. Smith*.

BEAN, J.—At the appropriate time counsel for defendant submitted a motion for a judgment of nonsuit and at the close of all the testimony requested the court to direct the jury to return a verdict in favor of defendant. These requests were denied. The proposition thus raised is the pivotal question in the case. Several exceptions were saved to the ruling of the court relating to the introduction of testimony but in so far as they are deemed important they hinge upon the main issue. It is the contention of defendant that the possession of the land in controversy held by the plaintiff and his predecessors was not adverse, but that the entry was made under an executory contract to purchase the premises and that each held in subordination to the title of defendant's predecessor, and recognized such title. Plaintiff contends that the possession of Brown, Phillips and Geddes became adverse in March, 1906, by virtue of the payment of the purchase price in full, and their possession with their successors in interest so continued until July 18, 1916, thus being in adverse possession for more than ten years.

1. There was an abundance of evidence tending to show that the plaintiff and his predecessors held possession of the land under a claim of right or ownership for

more than the statutory period of ten years, using the same for slaughter-house purposes and erecting buildings and making other improvements thereon and cultivating a portion thereof during the latter part of that time; that all the essential elements of adverse possession were present. The terms "claim of right," "claim of title" and "claim of ownership" when used in the books to express adverse intent mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right: 1 R. C. L., p. 706, § 19; *Crowder v. Doe*, 162 Ala. 151 (50 South. 230, 136 Am. St. Rep. 17); *Power v. Kitching* (N. D.), 88 Am. St. Rep. 701, note at page 703.

2. The possession of the partnership of Brown, Phillips and Geddes, the vendees, under an executory contract for the purchase of the land from the Sumpter Lumber Company, the vendor, after the full payment of the consideration in March, 1906, was presumptively adverse to the vendor and its successor who had notice of the vendees' rights: *Anderson v. McCormick*, 18 Or. 301, 303 (22 Pac. 1062); *Ambrose v. Huntington*, 34 Or. 484, 489 (56 Pac. 513); *West v. Edwards*, 41 Or. 609, 614 (69 Pac. 992); *Bessler v. Powder River Gold Dredging Co.*, 90 Or. 663 (176 Pac. 791, 178 Pac. 237); *Watts v. Witt*, 39 S. C. 356 (17 S. E. 822); *Woods v. Montevallo etc. Co.*, 84 Ala. 560 (3 South. 475, 5 Am. St. Rep. 393); *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589 (18 Am. Dec. 463); note to *Jasperson v. Scharnikow* (U. S. C. C. A.), 15 L. R. A. (N. S.) 1178, 1236. The rule is stated in R. C. L., page 751, Section 74, thus;

"But the possession of the vendee of land, under contract to purchase, whether oral or written, after payment of the entire purchase money, is presumptively

adverse to that of his vendor from the time that such payment was made. Nor is his possession prevented from being adverse by his knowledge of a defect in the title, or his subsequent demand for a deed; * * ”

It is stated in 2 C. J., page 154, Section 273, as follows:

“While the law seems to be otherwise in some states, the decided weight of authority is to the effect that a vendee of land in possession under a contract of sale by parol or in writing holds adversely to his vendor from the moment of payment or performance of the conditions of the contract, although a deed is not executed, and if this possession is continued for the statutory period the purchaser acquires title by the statute of limitations. However, the vendee may, by express recognition of the vendor’s title, defeat the adverse character of his possession.”

The rule is announced that under an executory contract for the purchase of land where the entire consideration has been paid the vendee is not required to give further notice to his vendor that he holds adversely, the payment of the purchase price in itself being notice: *Normant v. Eureka County*, 98 Ala. 181 (12 South. 454, 39 Am. St. Rep. 45); *Watts v. Witt*, 39 S. C. 356 (17 S. E. 822). The knowledge of the members of the partnership, the vendees, that their title was not perfect would not prevent their possession from being hostile, neither would their demand for a deed made in the former suit work such a hindrance. The suit was a solemn assertion in the court that they claimed the right to the land.

In *Anderson v. McCormick*, 18 Or. 301, 303 (22 Pac. 1062), this court speaking by Mr. Justice STRAHAN adopted the rule which prevails in most of the states of the Union. The following language was there used about which there can be no misunderstanding:

“The rule seems to be that where a purchaser enters into possession of land under an executory contract which leaves the legal title in his vendor, and contemplates a further conveyance of the complete title, his entry will be in subordination to the legal title; and in such case, as also in the case of lessee and other similar cases, where one is under the owner of the legal title, a privity exists which precludes the idea of a hostile or tortious possession that could silently ripen into an adverse possession under the statute of limitations: *Core v. Faupel*, 24 W. Va. 238; *Jackson v. Spear*, 7 Wend. (N. Y.) 401; *Williams v. Snidow*, 4 Leigh (Va.), 14; *Gay v. Moffit*, 2 Bibb. (Ky.) 506 (5 Am. Dec. 633); *Keys v. Mason*, 44 Tex. 140; *Pratt v. Caulfield*, 67 Mo. 50. But where the vendee has executed his part of the agreement by the payment of the purchase money, his possession is from that time adverse to the vendor.”

There has been no deviation from such announcement in this state.

3. Possession taken under an invalid contract, if continued the requisite period, will ripen into title, and such title will be equally as effective as if the same had been acquired under a valid contract: *Newsome v. Snow*, 91 Ala. 641 (8 South. 377, 24 Am. St. Rep. 934); *Bryan v. Atwater*, 5 Day (Conn.), 181 (5 Am. Dec. 136); *Woods v. Montevallo etc. Co.*, 84 Ala. 560 (3 South. 475, 5 Am. St. Rep. 393).

4, 5. The Sumpter Lumber Company knew or should have known of the possession and claim of plaintiff and his predecessors. An owner of premises is bound to take notice of the nature and extent of possession by claimant. The party holding the superior title is not in the condition of an ordinary and casual observer, but must diligently look to his own interests, know the boundaries of his own land, and ascertain the extent, meaning and locality of any settlement made within

them without his authority: 2 C. J., p. 268, § 597½, and note. Continued, unexplained possession of land for a long period of time is evidence that the possession is adverse, and makes out a *prima facie* case, and until rebutted by some satisfactory evidence is conclusive as to the nature of the possession: *Smith v. Badura*, 70 Or. 58, 62 (139 Pac. 107); *Dunnigan v. Wood*, 58 Or. 119, 124 (112 Pac. 531).

The position of the defendant is in effect that before possession taken by a vendee under a contract to purchase real property, although the purchase price has been paid in full, can be claimed to be adverse the contract must be such that upon performance by the vendee he can in equity compel a conveyance of the land. We are unable to agree with this claim.

6. Adverse possession is not based on title, but is in hostility to the true title. Title by adverse possession is not dependent on validity or invalidity of any contract of purchase or the presence or absence of a remedy in equity for specific performance. Title by adverse possession is acquired by the open, notorious, exclusive and uninterrupted antagonistic possession under a claim of ownership of land belonging to another for the full period of ten years, by a person whose claim of ownership would not be in violation of some contractual duty owing by him to the owner of the land, such as a tenant holding under a lease or the like. It must be in hostility to the true title. Where there is title there is no reason to invoke the doctrine of adverse possession. The plaintiff in this case bases his right to the land upon the principle of law that whereas he and his grantors or predecessors have had such adverse possession of the premises in controversy for the statutory period, the title to the

premises has been lost to the defendant and has become vested in the plaintiff.

7. It is unnecessary in this case for the court to pass upon the facts forming the basis of plaintiff's title. It is sufficient for us to find that the testimony in the case tends to support the allegations of plaintiff's complaint and reply. The pleadings in the case were before this court in the former appeal and were held to be sufficient, if true, to sustain plaintiff's title to the land. The ruling upon the former appeal has become the law of this case.

8. The claim of adverse possession might also be based upon the entry and possession of Smith and Mack on May 1, 1906, when they purchased the premises of Phillips, Brown and Geddes and paid in full therefor. The rule in regard to this second entry and possession of Smith and Mack is stated in 2 C. J., page 155, Section 276, thus:

"But after a purchaser from the vendee has paid his purchase money his continued possession is deemed adverse to the vendee and consequently to the original vendor, although the latter has not been paid, * * "

The testimony tended to show that Smith and Mack bought the land in the belief that the partnership owned the same and without any knowledge on their part that the Sumpter Lumber Company from whom the partnership had purchased had not executed a deed. Smith and Mack were not in privity with the Sumpter Lumber Company and knew nothing about its claim until the deal was closed and they had paid for the property. Under the circumstances disclosed by the testimony the possession of Smith and Mack clearly comes within the rule stated in 2 C. J. 155. See also *Montgomery County v. Severson*, 64 Iowa, 326 (17 N. W. 197, 20 N. W. 458). The latter case was a suit in-

stituted by Montgomery County to recover the possession of lands from the defendants which had been sold by the county to a company known as the American Emigrant Company and by it sold to various defendants or their predecessors in interest. The county had entered into a contract selling to the Emigrant Company the swamp-lands situated in the county, and subsequently instituted a suit against that company to recover the lands and to set aside and annul the contract on the ground that it was void for the reason that the county had no authority to make it. In this suit the county prevailed. It then sought to recover from the defendants the lands which had been sold to them by the Emigrant Company, paid for in full and of which they had taken possession. The defendants set up as a defense the statute of limitations and in discussing the availability of the statute of limitations in that case the court says on page 198 of the opinion (64 Iowa, 328, 17 N. W. 198):

“In each case as we have shown there was a contract for the sale of the lands and the respective defendants, or their grantors entered into the possession and held and improved the respective tracts as the owner thereof. They did not, it is true, hold the legal title or claim to hold it until the deeds to them were executed by the Emigrant Company. Until then they claimed but an equity in the lands which could be enforced upon the payment of the purchase money. It is not necessary for one relying upon the statute of limitations to show a legal title. A claim of right to the land is sufficient and this claim need not be based upon a legal title or a paper title. It may rest in parol. A claim based upon an equity is sufficient.”

9. The testimony in the present case tended to indicate that Phillips, Brown and Geddes in selling the land to Smith and Mack represented that they were the owners of the land and promised to convey that owner-

ship to the purchasers; that after they were unable to get the deed promised by the Sumpter Lumber Company, they paid Smith and Mack \$500 to release them from their obligation to secure a conveyance; that Smith and Mack accepted this sum with the understanding that it would not affect their title to the land nor their right to the premises. The partnership was obligated to furnish the deed, and, having failed to do so they had a right to secure a release from that obligation without in any way changing the rights of the parties to the land itself, and this they did in order to save themselves from the cost of obtaining a deed, as well as the damages sustained by Smith and Mack through their failure to comply with their agreement. The testimony tended to show and the jury evidently found in effect that Smith and Mack purchased the premises, paying therefor, and expecting to obtain a conveyance of the title thereto, but the partnership found that a deed could not be executed in accordance with their agreement and paid Smith and Mack the amount agreed upon for the difference between what they got and what they should have received according to terms of the sale to them by the partnership. The purchasers from the partnership obtained all the right to the land that this firm theretofore held. When this settlement was made Smith and Mack did not surrender any interest in the premises.

From a careful reading of the testimony in the case we find that there was ample evidence to sustain the allegations made by plaintiff in his pleadings. There was no error in denying the motion for judgment of nonsuit, or in refusing to direct a verdict in favor of defendant.

The question of the effect of the decree in the former suit was determined upon the first appeal in this case

in an opinion by Mr. Justice BENSON and also one by Mr. Justice BURNETT upon a petition for a rehearing, and further comment would be of no avail.

10. The defendant complains of the verdict for \$15,000 as excessive. In addition to the buildings and other improvements which the testimony tended to prove were destroyed and for which plaintiff claimed \$3,000 and about which there is little dispute, the evidence on behalf of plaintiff tended to show that the land in controversy is located in an old bed of the river, and was dredged to the depth of from 24 to 30 feet; that the different tests made in prospecting in the "old bed" a short distance above the Bessler tract showed approximately that the gravel would yield from 9.52 cents to 27.55 cents in gold per cubic yard. The testimony of Mr. Derby, the manager of the defendant company, in regard to the value of the ore extracted from the land, was as follows:

"Q. Do you know about how much the land in controversy produced?

"A. I know approximately.

"Q. How much?

"A. Approximately a gross of twenty thousand dollars, \$20,184."

The amount awarded by the jury was \$15,000 including compensation for the destruction of the buildings and other structures. The question was submitted to the jury under a charge by the court to which we find no exception on behalf of defendant as to the measure of damages. Under these conditions it cannot be said as a matter of law that the verdict is excessive. Obviously the jury did not deduct as much for the cost of dredging the land as the defendant claimed. They apparently considered that as the defendant was extracting gold from the adjoining land the margin of at

least \$8,184 was a fair value of the dredging. The case was plainly and fairly submitted to the jury by the instructions of the court.

After careful consideration, finding no error in the record the judgment of the lower court is affirmed.

AFFIRMED.

Rehearing denied February 17, 1920.

ON PETITION FOR REHEARING.

(187 Pac. 621.)

On petition for rehearing. Petition denied.

REHEARING DENIED.

Messrs. Clifford & Correll and Mr. Thomas H. Breeze, for the petition.

Mr. John L. Rand and Mr. A. A. Smith, contra.

BEAN, J.—Counsel for defendant files an earnest petition for a reconsideration of this case. The main contention is that “there is manifest error in drawing conclusions of ultimate facts, in diametrical opposition to those drawn by Mr. Justice HARRIS” in the former suit of *Bessler v. Derby*, 80 Or. 513 (157 Pac. 791).

In passing we wish to state that we notice no such conflict between the findings in the former suit and the conclusions of the jury in the present case.

Were it not for the fact that one of the learned counsel for defendant is from a sister state where apparently they do not preserve the distinction between an action at law and a suit in equity, as our Code does, we should not feel disposed to discuss this question. In our former opinion we twice declared, and we again as-

sert, that we do not find the facts or pass upon the question of the weight of the evidence in this law action. That is the province of the jury. The inhibition of our Constitution, Article VII, Section 3, is as follows:

“In actions at law, no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.”

Therefore, in referring to the facts which the jury found by their verdict, it is only for the purpose of ascertaining whether there is any substantial competent evidence to support the verdict. That is as far as our authority extends, as to conclusions of fact in an action at law. It does not seem to be claimed on the part of defendant, and indeed we do not see how it could be so claimed, that there was no competent evidence to sustain the verdict. There was some dispute it is true, and different conclusions of fact might reasonably be drawn from the circumstances of the case by the triers of the facts, but those matters were set at rest by the verdict.

Complaint is made in regard to the statement in reference to Blanchard, the agent of defendant of whom plaintiff's predecessors in interest attempted to purchase the land in question. Our discussion of the question of adverse possession of the land in our former memorandum was based upon the proposition that the contract of purchase under which plaintiff and his predecessors claimed was invalid, and we attempted to so state. Plaintiff's right to the land is based solely upon adverse possession thereof for the statutory period, and not upon a contract of purchase.

After a careful examination of the courteous petition for a rehearing, we adhere to our former opinion. The petition is denied.

AFFIRMED. REHEARING DENIED.

Argued November 21, 1919, affirmed January 13, rehearing denied February 17, 1920.

PULLEN v. SCHOOL DISTRICT No. 3.

(186 Pac. 9; 187 Pac. 624.)

Schools and School Districts—Bonds Incontestable After Execution, Registration, and Delivery to Purchaser.

1. Under Laws of 1913, page 299, legality of school district bonds executed, registered and delivered to purchaser as there provided after an election for their issuance, are incontestable, in the absence of fraud or some fatal defect in the proceedings, known to the purchaser at or before purchase.

ON PETITION FOR REHEARING.

Schools and School Districts—Contest of Bond Issue Election not Provided for.

2. Contests of election are authorized by statute only as between nominees claiming election to an office, and are not provided as such respecting elections about measures submitted to the people, as an issuance of bonds by a school district.

Schools and School Districts—No Contest of School District Bond Issue Election in Absence of Statutory Authority.

3. In the absence of statute permitting contest of an election whereby school district bonds were authorized, the Supreme Court cannot admit the legitimacy of contestants' complaint, and the question of whether or not certain voters were authorized to vote is not available to contestants; the decision of the election tribunal created by Laws of 1913, Chapter 172, Section 2, to decide such matters being final in the absence of fraud.

Schools and School Districts—Determination of Judges of Bond Issue Election as to Validity Conclusive on Collateral Attack.

4. Where judges and a clerk were properly chosen pursuant to Laws of 1913, Chapter 172, Section 2, to officiate at a school district bond issue election, a determination of such tribunal as to the validity of the election in the absence of fraud must stand as against collateral attack in the absence of any statute affording right of contest, appeal or other review of the decision.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 1.

This is a suit wherein it is sought to compel the immediate redemption and cancellation of a bond issue of the defendant school district, and to restrain the ex-

penditure of the proceeds of the sale of such bonds for any other purpose than such redemption. The plaintiffs base their right to relief upon an alleged conspiracy on the part of all of the defendants, with the exception of the county treasurer, to foist upon the taxpayers of the district the burden of an illegal issue of bonds in the sum of \$20,000. The wrongful acts of the conspirators, as set out in the complaint, consist of wrongfully permitting certain residents of the district to vote when in fact they were not qualified electors, because their names did not appear upon the last assessment-roll as the owners of property subject to taxation, and they were permitted to vote by virtue of their membership in a local corporation known as the Greater Parkrose Club, which did own real estate in the district, subject to taxation, as disclosed by the last assessment-roll. It is averred that this corporation does not issue stock, shares, or evidences of ownership to its members, and has no authority so to do, and no member thereof has any ownership in the corporation or its property. It is alleged that a true canvass and return of the votes cast by qualified electors would have disclosed a substantial majority against the issue of bonds. It is further asserted that the conspirators disobeyed the statute giving the state land board the preferential right to purchase the bonds at par, in that the bonds were sold at par without first offering them to the state land board. The allegations of the complaint enter into great detail, as to the part taken by the several defendants in the various steps which are claimed to have been illegal.

There were four separate answers filed by the defendants in logically related groups, all of which deny participation in any conspiracy, or any illegality in the proceedings or conduct of the several groups. The de-

endants Keeler Bros., the purchasers of the bonds, and Fred M. Glenn, their resident agent, pleaded affirmatively that prior to the delivery to them of the bonds, they obtained from the school district a certified copy of all the proceedings relating to the issue and sale of the bonds, wherein the proceedings were certified by the proper officials, and relying thereon, they had paid to the district the sum of \$20,400 therefor, without knowledge or notice that there was any defect, error or misstatement in such proceedings, and that before this suit was commenced they sold and at that time had parted with the possession of the bonds and with the title thereto and had no interest therein.

Replies were filed, and a trial was had, resulting in a decree for defendants, and plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. James R. Bain*, with an oral argument by *Mr. Duniway*.

For respondent, School District No. 3, there was a brief over the name of *Messrs. Wilson & Guthrie*, with an oral argument by *Mr. J. G. Wilson*.

For respondents, Keeler Bros. and Fred Glenn, there was a brief over the name of *Messrs. Teal, Minor & Winfree*, with an oral argument by *Mr. Wirt Minor*.

For respondents, *Walter H. Evans*, District Attorney, and *John M. Lewis*, there was a brief submitted over the name of *Mr. George W. Mowry*.

BENSON, J.—There are a number of questions presented and argued upon this appeal, but the view which

we take of the matter renders a discussion of many of them unnecessary.

1. We may assume at the outset that the Circuit Court had jurisdiction of the subject matter. Chapter 172 of the Laws of Oregon for 1913 provides that after an election for the issuance of school district bonds—

“All such bonds shall be signed by the chairman of the district school board, attested by the district clerk, and registered by the county treasurer; and the interest coupons thereto annexed shall be signed by said chairman and clerk, by their original or engraved facsimile signatures.

“The county treasurer shall register each bond in a book kept for that purpose in his office, noting the school district, amount, date, time and place of payment, rate of interest and such other facts as may be deemed proper, and cause said bonds to be delivered promptly to the purchasers thereof upon payment therefor, and he shall hold the proceeds of the sale of said bonds subject to the order of the district board to be used solely for the purpose for which said bonds were issued; and when said bonds shall have been so executed, registered and delivered, their legality shall not be open to contest by such school district or by any person or corporation for or on its behalf for any reason whatever.”

It is not necessary to consider the question of whether or not there may be any legal limitation to the broad language of the last provision above quoted, but it is beyond question that in the absence of fraud or some fatal defect in the proceedings, known to the purchaser of the bonds at the time of, or prior to such purchase, all further questioning is foreclosed. The bonds in the present case were executed, registered and delivered in strict accordance with the requirements of the statute, and after a very careful investigation of the evidence in the case, we find no indication whatever of

any conspiracy or any fraud, or that the purchasers of the bonds had any notice or knowledge of any irregularity or defect in the proceedings which resulted in the issue of the bonds.

The decree of the lower court is therefore affirmed.

AFFIRMED.

McBRIDE, C. J., and BENNETT and HARRIS, JJ., concur.

Denied February 17, 1920.

PETITION FOR REHEARING.

(187 Pac. 624.)

On petition for rehearing.

REHEARING DENIED.

Mr. Ralph R. Duniway and Mr. James R. Bain, for the petition.

Messrs. Wilson & Guthrie, for respondent, School Dist. No. 3, contra.

Messrs. Teal, Minor & Winfree, for respondents, Keeler Bros. and Fred Glenn, contra.

Mr. George W. Mowry, for respondents, Walter H. Evans, District Attorney, and John M. Lewis, contra.

BURNETT, J.—The petition for rehearing contends that this court should have directly examined into the question of whether or not certain electors who voted at the bond election mentioned in the pleadings were really qualified to vote on that question. We remember that the essence of the complaint is that the directors of the district, its clerk, the judges and the clerk

of the election, the district attorney of Multnomah County, the purchasers of the bonds, and their agents all entered into a conspiracy to defraud the district by loading upon it an unauthorized indebtedness to be accomplished by permitting fraudulent voting in the election called for the purpose of sanctioning the issuance of bonds. Section 2 of Chapter 172 of the Laws of 1913 authorizes the school districts of the state to contract a bonded indebtedness for the purpose of providing funds for the erection of school buildings, the purchase of sites therefor, etc. The school board may, and when petitioned by ten legal voters of the district must, give notice of an election to determine whether bonds shall be issued for the purpose named. The form of the notice is prescribed by the statute. This excerpt is taken from subdivision 1 of that section:

“Immediately prior to opening the polls, the legal voters of the district shall convene (the chairman or some other member of the district school board calling the meeting to order), and elect three judges and a clerk who shall conduct the election, and when the polls are closed, canvass the vote and certify the result to the district school board, the county treasurer and the county superintendent.”

It is said further in subdivision 2:

“If a majority of the ballots cast are ‘Bonds—Yes,’ the district school board shall, without a further vote of the legal voters and as soon as practical, issue the negotiable coupon bonds of the district, not exceeding in par value the amount stated in the notice of election and for the purpose therein named, bearing not to exceed legal interest per annum, payable semi-annually, redeemable at the pleasure of the district but due and payable absolutely 20 years from date; * * all such bonds shall be sold by the district school board for the best price obtainable, but in no event for less than par and must recite that they are issued under the provi-

sions of this act; all such bonds shall be signed by the chairman of the district school board, attested by the district clerk, and registered by the county treasurer; and the interest coupons thereto annexed shall be signed by said chairman and clerk, by their original or engraved facsimile signatures."

And in subdivision 3:

"The county treasurer shall register each bond in a book kept for that purpose in his office, * * and cause said bonds to be delivered promptly to the purchasers thereof upon payment therefor, and he shall hold the proceeds of the sale of said bonds subject to the order of the district board to be used solely for the purpose for which said bonds were issued; and when said bonds shall have been so executed, registered and delivered, their legality shall not be open to contest by such school district or by any person or corporation for or on its behalf for any reason whatever."

2. No pretense is made in the complaint that the bond election was not legally called or that regular notice was not given, nor is it contended that the legal voters did not elect the three judges and clerk who conducted the election. We thus have a tribunal chosen by the people themselves in popular assembly, authorized to conduct the election and certify the result to the school board, the county treasurer, and county superintendent. The statute does not authorize any appeal, review or contest of the decision of that tribunal. Contests of elections are authorized by statute only as between nominees claiming to be elected to an office. Contests as such are not provided for respecting elections about measures submitted to the people. As said in *Bradburn v. Wasco County*, 55 Or. 539 (106 Pac. 1018):

"The determination of election contests is a judicial function only, so far as authorized by statute."

The same language is quoted in *Tazwell v. Davis*, 64 Or. 325 (130 Pac. 400).

3. In substance and effect the effort of the complaint is to contest the election by which the bonds were authorized. In the absence of a statute permitting this to be done, we cannot entertain that contention. The question of whether or not the voters mentioned were authorized to vote is not available in this case. The decision of the tribunal created by law and chosen by the people to decide such matters is final, in the absence of some statute authorizing us to review its determination, or unless fraud is shown sufficient to vitiate the proceeding. It was in reference to this last feature that the court, speaking by Mr. Justice BENSON, used the language:

“But it is beyond question that in the absence of fraud or some fatal defect in the proceedings, known to the purchasers of the bonds at the time of, or prior to such purchase, all further question is foreclosed.”

4. We must presume that the election was regularly called, and that the assembled electors regularly chose the judges and clerk of the election. It is not alleged in the complaint that any objection was urged by challenge or otherwise against the right of the individuals to vote who are named in the complaint as illegal voters. Neither is it intimated that the election officers had any notice that any of those offering to vote were not entitled to vote. Fraud cannot be predicated on such a complaint. In other words, given a tribunal properly organized to decide a question, its determination, in the absence of fraud, must stand as against collateral attack in the absence of any statute affording a right of contest or appeal, or otherwise reviewing that decision. The proceeding before us was com-

menced too late, in any event, to raise the question, for the statute expressly says that:

“When said bonds shall have been so executed, registered and delivered, their legality shall not be open to contest by such school district or by any person or corporation for or on its behalf, for any reason whatever.”

In the original brief, under the second subdivision of their points and authorities the plaintiffs maintain that:

“This is a suit to cancel the bonds issued by the Park-rose School District.”

In their brief in support of the petition for rehearing, they argue vehemently that “this suit is not to contest the legality of the bonds, but to require the defendant to redeem the bonds,” and they say that the bonds can be paid at any time. Even so; but the statute already quoted makes them redeemable at the pleasure of the district, but due and payable absolutely twenty years from date. The statute is not an authority for the contention of the plaintiffs. The district is not, so far as the record shows, attempting to exercise its option to redeem the bonds. If this be considered as a suit to redeem the bonds, it is not at the pleasure of the district, but at the behest of some discontented electors.

The authorities cited in the brief for rehearing to the effect that the plaintiffs are entitled to the relief of a judgment for the school district for whatever damages it has suffered or will suffer as a result of the bond issue, are based upon the principle that fraud has been shown in the genesis of the bonds, or that there was no authority in law for their issuance. For instance, in *Plainview v. Winona etc. R. R. Co.*, 36 Minn. 505 (32 N. W. 745), the town, under an unconstitutional

statute, issued bonds in aid of a railroad. The defendant, the beneficiary, took them with full knowledge of their invalidity and negotiated them to citizens of another state for full value. The United States court gave judgment in favor of the holders against the town for unpaid coupons, holding that they took in good faith. The state court held in the case under consideration that the bonds were void; that the defendant participated in their issuance, knowing all the facts, and had negotiated them so that the town could not recall them, and hence equity would give a money relief to cover the liability of the town as declared by the federal court.

In *Farnham v. Benedict*, 107 N. Y. 159 (13 N. E. 784), the bonds were issued in aid of a fictitious railroad company, which failed to perform the consideration of the bonds. The court held the bonds void except as to innocent holders, but held liable to the extent for which the town was liable the defendants who negotiated the same with knowledge of their defects. In *McMillan v. Barber Asphalt Paving Co.*, 151 Wis. 48 (138 N. W. 94, Ann. Cas. 1914B, 53), the contract for paving under which the bonds were to be issued was vitiated by the fraud of bribing an alderman of the city, who was thus induced to assent to the contract. Litigation was instituted to prevent the execution of the contract and to declare it void. But, notwithstanding the pendency of this litigation, the company performed the contract and thus apparently authorized an imposition upon the property of the plaintiff to pay its proportionate cost of the pavement. The court there held that, on account of the plaintiff's property having been made liable to innocent holders of the bonds, the company which had brought about this situation in pursuance of the fraud practiced should save him harmless

from the impost by paying the amount thereof. In *Luetzke v. Roberts*, 130 Wis. 97 (109 N. W. 949), the defendant by means of fraud induced the plaintiff to sign a promissory note. Pending the plaintiff's suit to cancel the same, the defendant sold it to an innocent purchaser. As it was thus placed beyond the power of the court, the final decree for the plaintiff was for a money damage in lieu of the paper, as equitable relief instead of the cancellation. This feature is common to all the precedents cited in the brief supporting the petition for rehearing. As pointed out in the former opinion, there is no evidence of fraudulent conduct on the part of anyone connected with this proceeding; in fact, none is set forth in the complaint except statements amounting only to conclusions of law. On this account the precedents cited by the plaintiffs are not in point.

Reduced to its lowest terms, the most that is charged in the complaint is that the judges of the election decided erroneously the matter of the right of certain individuals to vote. In the absence of fraud or want of jurisdiction, neither of which is shown in the present procedure, we cannot review the decision of the judges of which the plaintiffs complain. We adhere to the former opinion. **AFFIRMED. REHEARING DENIED.**

McBRIDE, C. J., and BENSON, J., concur.

HARRIS, J., concurs in the result.

Argued November 14, 1919, modified January 20, motion to retax costs denied February 17, 1920.

PARKS v. SMITH.

(186 Pac. 552, 554.)

Mortgages—Foreclosure—Defendant has Burden of Proving Counterclaim for Fraud.

1. In action to foreclose purchase-money mortgage, in which defendants counterclaimed damages for false representations, the burden of proving fraud and damages was upon defendants.

Fraud—No Damages for Misrepresentation in Land Exchange Transaction Where Property Exchanged is of Equal Value.

2. A party to a land exchange transaction cannot recover damages for misrepresentations made by adverse party in effecting transaction where they receive property of equal value.

Mortgages—Amount of Attorney's Fees Governed by Laws of State in Which Suit is Brought.

3. Oregon court, in foreclosing mortgage securing note providing for an additional 10 per cent as attorney's fees, will not allow a reasonable amount for attorney's fees pursuant to California law, though note was executed in California, notwithstanding Section 5835, L. O. L.; attorney's fees being a matter of procedure.

Mortgages—No Reasonable Attorney's Fee Allowed Under Provision of Note Providing for a Fixed Amount.

4. Where parties stipulate in a note for the fixed amount to be allowed as attorney's fee in case of suit, whether much or little is done in such suit, the court will not make a new contract for such parties and adjudicate a reasonable amount for the services of the attorney nor allow any attorney's fee except the statutory costs.

Mortgages—Agreement to Pay Reasonable Attorney's Fee Valid.

5. An agreement by a debtor to pay such sum as the court may adjudge reasonable as attorney's fees in case of suit or action to enforce payment is valid.

[As to the validity and enforceability of provision in mortgage fixing attorney's fees on foreclosure, see note in 19 Ann. Cas. 1068.]

ON MOTION TO RETAX COSTS.

Appeal and Error—Costs on Modification of Decree—Prevailing Party.

6. Where upon appeal decree of lower court is modified in a substantial amount, appellant is entitled to costs and disbursements, unless for equitable reasons appellate court shall decree otherwise.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

This is a suit to foreclose a mortgage for \$900 and interest. A decree was rendered in favor of plaintiffs, from which defendants appeal.

The defendants, by their answer, pleaded as a counterclaim that the plaintiffs misrepresented the land conveyed to defendants by plaintiffs in exchange for real property of defendants to their damage in the sum of \$4,000. The reply put in issue the averments of the answer.

MODIFIED.

For appellants there was a brief over the names of *Mr. J. M. Devers* and *Mr. C. A. Hardy*, with an oral argument by *Mr. Devers*.

For respondents there was a brief and an oral argument by *Mr. Fred E. Smith*.

BEAN, J.—On February 15, 1916, the defendants were the owners of four lots with a frontage of one hundred feet, and two small houses in the City of San Diego, California; the plaintiffs were the owners of all of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24, Tp. 17 S., R. 11 W., W. M., containing 160 acres of land, more or less, in Lane County, Oregon. The plaintiffs and defendants exchanged their respective properties. Each valued their property at \$6,000. There was a mortgage of \$800 on the San Diego property which plaintiffs assumed. As an offset to this mortgage defendants executed to plaintiffs a note and mortgage on the Oregon property for \$900 with interest. At the time of the trade all of the parties were in San Diego. Plaintiffs had entered the Oregon land as a pre-emption; had not lived on it for about twenty years, and

had not seen it for about twelve years. No one else had lived on the land. Defendants allege, as the gist of their answer, that:

“In order to persuade and induce these defendants to make said trade and exchange, the said plaintiffs represented and stated to these defendants that the property of said plaintiffs, being the above-described property, was located only five and one-half miles from Mapleton, in Lane County, Oregon, by wagon road, and only three and one-half miles by section line; that all of said land was level and tillable except two acres; that there were on said land no big trees except twenty or thirty dead fir or cedar trees; that the river crossed said land at only one place, and that being directly across one forty; that all of said land was low bench or bottom land; that the public highway skirted the said premises, and that said land was of the reasonable market value of \$6,000.

“These defendants allege further that the said Lane County land is ten miles from Mapleton, that there are not to exceed 50 or 60 acres of said land which is level, that the remainder is rough, hilly, precipitous, some of which is inaccessible by reason of its steep and precipitous nature; that practically the whole of said land is heavily timbered with large dead trees, mostly fallen, a part of which timber is what is described as ‘an old burn’; that the public highway which is 60 feet in width traversed said land in a zigzag manner; that the river enters and crosses said land at three different points, making thereby much of said land valueless.”

Defendants also allege that the premises were not worth to exceed \$1,200.

It appears that defendant Parks advised plaintiff Smith to inspect the land, but instead of so doing he made inquiry in regard to the real property of one Shulte who had recently been in the neighborhood of the land for about a week and once went to the land

but did not go over it. Shulte inquired of people living near the land, in respect to the same, and states that he informed Smith as to what he had heard, advising him to "discount" the report, and that there were said to be from sixty to one hundred acres of tillable land in the tract, that it was brushy and very hard to clear. It is estimated by testimony on behalf of defendants that there are about fifty or sixty acres of bottom and low bench land which is very productive when cleared and can be tilled; and that the balance of the quarter is hilly fern land, of little value. It seems that defendants made an independent investigation in regard to the land, but they relied upon mere hearsay or rumor. Defendant Smith had lived in Lane County prior to the time of the trade, and was informed that the land was covered with brush and small timber and practically unimproved. The timber was examined by a timber cruiser, who estimated the value to be \$850, at \$1 per thousand. Smith wrote to the postmaster living near the land, inquiring in regard thereto; but did not wait until he received an answer before trading. The defendants were careless and negligent in the transaction. They now complain that it will cost \$50 or \$60 per acre to clear the land so that it can be cultivated: See *Waymire v. Shipley*, 52 Or. 464, 473 (97 Pac. 807). Both parties to the deal puffed their property and greatly exaggerated the value.

The trial court found the San Diego lots were of the fair market value of \$2,500. It appears there had been a flood in the locality a short time before the exchange; the lots were about three miles from the business center of the city, with inconvenient street car service; and there was little or no demand for the property except for trade. The trial court fixed the fair market value of the Oregon property at \$2,000. We are un-

able to determine from the evidence which of the properties was, at the time, of greater value.

1, 2. We concur in the conclusion of the learned trial judge, that the defendants have failed to prove the facts alleged as a defense. The court cannot make a new contract for the parties. In order to conserve space we mention only a portion of the facts. There is a conflict in the evidence. The lower court heard the witnesses for the defendants and its findings are entitled to great weight. The burden of proving fraud and damages is upon the defendants: *Weimer v. Smith*, 22 Or. 469, 475 (30 Pac. 416; *Hamlin v. Tharp*, 88 Or. 169 (171 Pac. 894). Defendants cannot recover damages for misrepresentation in effecting an exchange of property, if they received property of equal value: *Ward v. Jenson*, 87 Or. 314 (170 Pac. 538); *Salisbury v. Goddard*, 79 Or. 593 (156 Pac. 261).

The note and mortgage in the suit were executed in the State of California, and provide as follows:

“Should suit be commenced or an attorney employed to enforce the payment of this note, we agree to pay an additional sum of 10 per cent on principal and accrued interest, as attorney’s fees in such suit.”

3. Defendants assert that the court erred in allowing plaintiffs an attorney’s fee of \$115 in this suit. It is alleged and shown that under the statute of the State of California, in actions for the foreclosure of a mortgage, where the mortgage provides for the payment of attorneys’ fees, the court may allow “such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage.” Plaintiffs urge that the note having been executed in California, that law should govern, in view of Section 5835, L. O. L., which enacts, that the sum payable in a negotiable instrument “is a sum certain within the mean-

ing of this act, although it is to be paid * * (5) with cost of collection or an attorney's fee, in case payment shall not be made at maturity." We fail to see that the latter section of our negotiable instruments law affects the matter of attorneys' fees in a suit to foreclose a mortgage.

4, 5. The statute of California does not change the procedure in a suit to foreclose a mortgage in this state. It is quite well settled in Oregon that where parties stipulate in a note for a fixed amount to be allowed as an attorney's fee, in case of suit, whether much or little is done in such suit, the court will not make a new contract for such parties and adjudicate a reasonable amount for the services of the attorney nor allow any attorney's fee except the statutory costs. This question is not an open one. We have no statute like the one in California: *Balfour v. Davis*, 14 Or. 47, 53 (12 Pac. 89); *Kimball v. Moir*, 15 Or. 427 (15 Pac. 669); *Bank v. Davidson*, 18 Or. 57, 68 (22 Pac. 517); *Levin v. Briggs*, 21 Or. 333 (28 Pac. 15, 14 L. R. A. 188). See note, Ann. Cas. 1917D, page 365. We see no valid reason for changing the long-established rule. An agreement by a debtor to pay such sum as the court may adjudge reasonable, as attorneys' fees, in case of suit or action to enforce payment, is upheld in this state: *Peyser v. Cole*, 11 Or. 39 (4 Pac. 520, 50 Am. Rep. 451).

The decree of the lower court will be modified by eliminating the attorney's fee, \$115, and affirmed as modified.

MODIFIED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Denied February 17, 1920.

MOTION TO RETAX COSTS.

(186 Pac. 554.)

Respondents file motion to retax costs as allowed by clerk.

MOTION DENIED.

Mr. Fred E. Smith, for the motion.

Mr. J. M. Devers and Mr. C. A. Hardy, contra.

BEAN, J.—The decree of the Circuit Court in the above-entitled suit having been reduced upon appeal to this court in the sum of \$115, in an opinion rendered January 20, 1920, the clerk properly taxed the costs against the respondents, who now file a motion to retax the costs and disbursements and allow respondents their costs.

6. It is not necessary to cite authorities to the effect that the prevailing parties, upon an appeal where the decree is modified, are entitled to their costs and disbursements in a suit in equity, unless for equitable reasons the court shall decree otherwise. Upon the hearing upon the merits it was not considered that the equities of the case demanded that the rule as to costs should be relaxed or changed. We are still of the same opinion. The motion to retax is in effect an application for rehearing. The decree having been modified in a substantial amount, the appellants are entitled to their costs.

The motion to retax the costs is denied.

MOTION DENIED.

Argued January 20, affirmed February 17, 1920.

PLUMMER v. PLUMMER.

(187 Pac. 617.)

Divorce—Evidence of Wife's Cruelty Showing Ground for Divorce.

1. In a husband's divorce suit for cruel and inhuman treatment, where the evidence showed a year or more of domestic peace after the marriage, and that thereafter the relations of the parties became estranged until they reached the breaking point, and reconciliation apparently became impossible, notwithstanding efforts to bring about an adjustment of differences, decree for plaintiff husband was proper, and will be affirmed.

From Multnomah: **GEORGE W. STAPLETON**, Judge.

Department 1.

The plaintiff began this suit for a divorce by filing a complaint on April 8, 1918, charging the defendant with cruel and inhuman treatment.

The defendant answered by denying the accusations made against her and by making a counter-charge of cruel and inhuman treatment against the plaintiff. There was a decree for the plaintiff. The defendant appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Henry S. Westbrook*.

For respondent there was a brief and an oral argument by *Mr. Herbert R. Dewart*.

HARRIS, J.—The plaintiff had two children, one aged seven and the other aged six years, by a prior marriage; and the defendant had three children, aged respectively three, five and eight years, by a previous marriage. The parties to this suit were married on March 20, 1917. In the language of the plaintiff, "the

first three months of our married life there was naturally more or less of the honeymoon period"; while according to the testimony of the defendant, "our disturbance commenced shortly after we were married." The domestic atmosphere seems to have been fairly clear until June or possibly July, 1918, when rumblings could be heard. The clouds began to gather in the domestic sky, and finally in October the storm broke, and thenceforth reconciliation apparently became impossible, notwithstanding efforts to bring about an adjustment of differences. A recital and an analysis of all the evidence could not serve any useful purpose whatsoever; and for that reason it is sufficient to say that the entire record has been read, and it has received our careful consideration. An examination of the evidence brings us to the conclusion that the facts warranted the decree rendered by the trial judge. The decree is therefore affirmed, but without costs to either party in this court.

AFFIRMED.

McBRIDE, C. J., and BEAN and BURNETT, JJ., concur.

Argued January 8, reversed and remanded February 17, 1920.

ARSTILL v. FLETCHER.

(187 Pac. 854.)

Pleading—Amendment Changing Action from Trespass to Contract Properly Allowed.

1. Plaintiff, a land owner, who sued a contractor and a drainage district on the ground that, in construction of the ditch in part over plaintiff's land, earth excavated was thrown on the land of another, held, in view of Section 102, L. O. L., properly allowed to file an amended complaint more fully setting forth the facts, despite the claim that the first complaint was one in trespass, and the second for breach of contract; each complaint showing the same facts.

Drains—Land Owner cannot Complain That Earth from His Land was Thrown on Adjacent Land to Make Barrier Where "Plan" Made No Provision for Such Method.

2. The "plan" required by Laws of 1915, page 540, relating to the formation of drainage districts, need not specify the disposition of earth to be excavated; a "plan" contemplating the representation of anything drawn on a plane, as a map or chart. Hence a land owner cannot complain that, though the plan for ditch did not so provide, earth excavated was placed on the west side of the ditch on the land of another owner to serve as a barrier against high water; the work being carried on under the direction of officers of the district.

Drains—Plan Approved by Drainage Officers Conclusive in Absence of Fraud.

3. Under Laws of 1915, page 540, the officers of a drainage district have authority to approve plans for construction of a ditch, and, in the absence of fraud, the plan as approved by the County Court cannot be reviewed collaterally by any other tribunal.

Evidence—Effect of Admissions of Counsel.

4. Where plaintiff's counsel at the trial admitted that a drainage ditch constructed over plaintiff's land was constructed with authority, and the only contention was over the disposition of the earth excavated, plaintiff cannot recover on the theory that private property cannot be taken under Constitution, Article I, Section 18, for public use without just compensation.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 1.

The individual defendants are the supervisors and contractor of the corporate defendant, the Big Nestucca Drainage District. The plaintiff owns a quarter-section of land in Tillamook County in the territory controlled by the Drainage District. In the first complaint filed it is said that:

"In the exercise of its said jurisdiction, the said drainage district acting by and through the defendant directors, on or about the first day of April, 1918, laid out and established a system of drainage ditches in said district, had the same duly located and surveyed, and located and established one of the said drainage ditches over and within the said lands of the plaintiff, said ditch being wholly within the said lands of the plaintiff, and running along the west boundary line of said lands."

This allegation is admitted by the answer. The burden of the plaintiff's grievance is that the district through its contractor and supervisors deposited the earth taken from the ditch on the west side thereof, where it rested mainly, if not entirely, upon the land of another proprietor, instead of putting it on the east side, where it could be used by the plaintiff in filling low places on his land. He asserts that by this means he was wrongly deprived of more than six thousand cubic yards of earth belonging to him, of the reasonable value of fifty cents per yard, aggregating \$3,000, for which sum as damages he demands judgment.

The organization of the defendant drainage district, the official character of its supervisors, and the fact that the defendant Fletcher was a contractor, are all admitted. The wrongs complained of are denied. The answer avows the establishment of a system of drainage ditches in the district, one of which runs along the west boundary line of the plaintiff's lands and says that he granted a right of way and license for the construction of the ditch, in pursuance of which the work was done. The defendants claim that the property in that neighborhood, including that of the plaintiff, was damaged by the overflow of Clear Creek; that the surplus waters ran from plaintiff's tract westerly through other holdings in the district which were lower than his and of a swampy character, and that in the construction of the ditch the intention was to take care, not only of the ordinary flow of the creek, but also to prevent the flood waters from running over upon the lands to the westward; and in order to do so the earth excavated in constructing the ditch was deposited in large part on the west, so as to raise an embankment designed to aid in preventing the overflow of the water to the west. It is further stated in substance that the

earth not needed for that purpose was deposited upon the lands of the plaintiff.

The reply challenges the answer in material particulars and denies that the plaintiff gave any license or right of way for the construction of the ditch. After the case was thus at issue, the court, over the objection of the defendants to the effect that it would change the issues to be tried, allowed the plaintiff to file an amended complaint. This new pleading states the organization of the district and the official character of the supervisors and the fact of Fletcher's being a contractor, as in the first complaint, and it says that the district, acting through its supervisors, surveyed and laid out a proposed system of drainage ditches, locating one section thereof within plaintiff's lands running parallel to the west boundary thereof. The following averment appears in the amended complaint:

"That on or about the date last mentioned, said system of drainage was formally adopted by said district, but neither the said defendant district, nor either of the other defendants, acquired any rights in or to said lands, or any rights to construct the said section of said drainage ditches thereover, by condemnation, or otherwise, other than a mere oral license from the plaintiff to the defendant district to construct said section on plaintiff's premises, aforesaid, as proposed by said plan, which license was coupled with the expressed condition that all soil and earth taken or excavated from the said section would be the property of the plaintiff, and should be deposited upon the plaintiff's land for his use and benefit."

The remainder of the new pleading respecting the excavation of the ditch and the deposit of the earth on the west side thereof is substantially the same as in the first instance. It was stipulated that the original

answer should be deemed an answer to the amended complaint and that the reply should stand as before.

On the issues thus formed the cause came on for hearing. At the beginning of the trial, the plaintiff by his attorney stated to the court and jury that the plaintiff did not question or dispute the right of the defendants to construct the ditch; that he desired it to be constructed, and that the defendants had a right to excavate the same; but that he claimed to be entitled to the dirt removed therefrom. Later on, after the plaintiff himself was sworn as a witness, his attorney renewed the admission, saying that, "We do not dispute the right of the defendants to excavate the dirt in question from the ditch." The defendants then objected to the introduction of any testimony in the action, assigning as a reason that, under the condition brought about by plaintiff's admission in open court, the complaint does not state facts sufficient to constitute a cause of action. The court overruled the objection.

The case proceeded to trial, resulting in a verdict in favor of the plaintiff and against the district only, for the sum of \$500, and a judgment was rendered in favor of the plaintiff and against the district for that amount of money, together with costs and disbursements. All the defendants appeal. REVERSED AND REMANDED.

For appellants there was a brief and an oral argument by *Mr. H. T. Botts*.

For respondent there was a brief over the name of *Messrs. Johnson & Handly*, with an oral argument by *Mr. Sidney S. Johnson*,

BURNETT, J.—1. Opposing the filing of the amended complaint, the defendants argued that the original complaint stated a cause of action substantially for trespass and the amended complaint sets forth a breach of contract giving rise to damages. In our judgment, the contention of the defendants in this respect is unsound. It is said in the original complaint that the ditch in question was duly located, surveyed and established over and within the land of the plaintiff. The allegation of the second complaint is substantially the same. The effect of the two pleadings is identical. Both plainly point out that the bone of contention is the earth which was dug out of the ditch. The court was clearly within the bounds of its discretion in allowing the amendment before trial, as described in Section 102, L. O. L., reading thus:

“The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of the party, or other allegation material to the cause; and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved.”

2-4. The important assignment of error relied upon by the defendants is found in their objection to various parts of the charge of the court to the jury. In substance the instructions challenged are that, whatever the necessity in the construction of the ditch, the defendants had no right to throw the excavated earth upon the west side thereof and beyond the plaintiff's line unless the original plan of drainage adopted by the

district directed that the earth should be thus deposited, and further, that although the original plan designated the west side of the ditch as the place to put the excavated earth, yet the jury had a right to consider whether or not it was necessary so to do, and to what extent it was requisite. In other words, the effect of the instructions was to submit to review and revision by the jury the judgment of the district and its engineer exercised in the construction of the ditch.

The formation of drainage districts had its origin in Chapter 340 of the Laws of 1915, entitled "An act to provide for the organization of drainage districts, for the construction, operation and maintenance of drainage systems, for the payment of the cost of such systems and the expenses incidental thereto." The organization of such a body is inaugurated by filing in the office of the county clerk a petition signed by the owners of 50 per cent of the acreage of swamp, wet, overflowed or irrigated lands included in the proposed district. After certain preliminary procedure, three supervisors are elected. They then appoint an engineer, who shall have control of the engineering work in the district. The act, Section 8, requires that:

"The said engineer or engineers shall make all necessary surveys of the lands within the boundary lines of said district, as described in the petition, and of all lands adjacent thereto that may be or will be improved or reclaimed in part or in whole by any system of drainage or levees that may be outlined and adopted, and said engineer or engineers shall make a report in writing to the board of supervisors with maps and profiles of said surveys, which report shall contain a plan for draining and reclaiming the lands described in the petition or adjacent thereto from overflow or damage by water; said maps and profiles shall also indicate so far as necessary the physical characteristics of the lands, and location of any public roads, railroads

and other rights of way, roadways and other property or improvements located on such lands. * * Upon receipt of the final report of said engineer concerning surveys made of the lands contained in the district organized, and plans for reclaiming the same, the board of supervisors shall adopt such report or any modification thereof approved by the chief engineer and thereafter such adopted report shall be the plan for draining and reclaiming such lands from overflow or damage by water, and it shall after such adoption be known and designated as 'the plan for reclamation,' which plan shall be filed with the secretary of the board of supervisors and by him copied into the records of the district."

The County Court is required to appoint three commissioners possessing certain qualifications. Equipped with a copy of the plan and list of lands involved, they inspect the district and the lands therein and assess the benefits and damages accruing to each tract. Their report is filed with the County Court and opportunity to be heard in objection to the report is afforded by published notice. After considering all objections and exceptions, if the County Court is satisfied that the estimated cost of the improvement is less than the benefits to be derived therefrom, it shall approve and confirm the commissioners' report as amended or modified. Anyone aggrieved may appeal from the judgment of approval. The act then empowers the supervisors "to build, construct and complete all or any works and improvements which may be needed to carry out 'the plan of reclamation,' to hire men and teams, and to purchase equipment and supplies." These notations respecting the provisions of the drainage district law are taken from the act already mentioned and the amendments thereto found in Chapter 414 of the Laws of 1917.

One of the contentions of the plaintiff, which seems to have been adopted by the court, is that the plan must specify that the earth taken out of the ditch is to be deposited upon the west side; for want of which the defendants would be guilty of wrong to the plaintiff in putting it there. In our judgment, no such meaning can be predicated of the term "plan" as used in the act. "Plan" contemplates "the representation of anything drawn on a plane, as a map or chart": Standard Dictionary. In other words, it is a map. It does not include the delineation of cross-sections or elevations. It has to do with the length and direction of the ditches designed to effect the drainage desired. It is not contemplated by the act that the plan shall include particular and minute specifications about where each spadeful of earth shall be deposited. These things must be left in practice to the governmental discretion of the officers of the drainage district. The district, operating through its supervisors, is a branch of governmental power the exercise of which is designed to accomplish results beneficial to at least a portion of the public, the land owners whose property is advantageously affected by the project. In the absence of fraud, their plan as approved by the judicial examination of the county court is not to be called in question or reviewed collaterally by any other tribunal. Much less is it to be left to the judgment of a trial jury in an action for damages. The principle is well stated in the opinion of Mr. Justice MOORE in *Giaconi v. Astoria*, 60 Or. 12, 19 (113 Pac. 855, 37 L. R. A. (N. S.) 1150), thus:

"A municipal corporation in devising plans for improving public highways within its borders acts judicially, and when proceeding in good faith is not liable for errors of judgment; but in constructing the work it acts ministerially, and is bound to see that the

plan is executed in a reasonably safe and skillful manner"; citing authorities.

The question there involved was the grading of a street, but the principle is the same in the instant case, for in both situations there is involved the exercise of governmental authority.

It is true, as contended by the plaintiff, that:

"Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in case of the state, without such compensation first assessed and tendered": Oregon Constitution, Article I, Section 18.

This condition is met and satisfied in the case at bar by the statement at the trial by the plaintiff's counsel to the effect that the defendants had a right to construct the ditch. What the plaintiff's attorney said was in legal effect an admission that the land had been legally condemned and the matter of compensation properly adjusted by judicial proceedings or agreement of the parties. Under the constitutional guaranty above noted the defendants would have no right to invade the premises of the plaintiff and construct the ditch until the matter of compensation was first adjusted. We have, then, a case where the defendants are justified in taking the plaintiff's property so far as it is involved in the construction of the ditch.

Under Section 16 of the original act, the supervisors have full power and authority to build, construct and complete all or any works or improvements which may be needed to carry out the plan. The fallacy of the plaintiff's argument, seemingly adopted by the court, lies in the apparent assumption that a drainage ditch is constructed solely by excavation. This is not always the case. Such construction may often include filling as well as excavation. Anyone with practical

knowledge of the subject may readily see as an illustration that a ditch on a steep side-hill will consist very largely of an embankment on the lower side. The dirt is never piled on the upper side in such cases. And in this instance, the levee formed by the deposit of the earth on the west side probably was designed to prevent the flood waters going beyond the ditch to inundate the lower lands in that direction. In other words, it was most likely intended as a reinforcement of the ditch.

Having in mind the objects to be obtained and the benefits to be acquired by the project, much must be left to the judgment of the district officers, acting in their governmental capacity in carrying out the original design or plan. They are not here charged, as in the *Giaconi* case, with having acted negligently. Neither is fraud imputed to them. Giving it full effect in favor of the plaintiff, the most that is alleged is that in their judgment the proper place to deposit the earth was on the west side of the ditch. That they had a right to use the earth acquired in the excavation for the purpose of completing its construction is taught by the opinion of Mr. Justice McBride in *Sharkey v. Portland*, 58 Or. 353 (114 Pac. 933). The matter involved in that case was the grading of a street. It is there said:

“The weight of authority seems to be that the city is entitled to use the earth excavated from one portion of a street to make fills required upon the same street, or upon other streets embraced in the same general plan of improvement.”

The subject is treated at length in *Hamby v. Dawson Springs*, 126 Ky. 451 (31 Ky. Law Rep. 814, 104 S. W. 259, 12 L. R. A. (N. S.) 1164), and particularly in the note in the latter publication.

We may safely say that in making an improvement of the kind in question the public authorities have a right to use the material found in the ditch for the completion of that particular work, and that, in the absence of fraud or negligence, they are not liable for the consequent injury which may happen to the land owner. These questions are properly to be worked out and concluded in condemnation proceedings. Once given the right to construct the ditch, they have full power and authority, as declared in the statute, to do those things which are proper for the accomplishment of the work in hand. The analogy of street grading cases holds good in one of the sort before us. The action of the officers within such limits, that is, without negligence or fraud, is not subject to collateral review by a jury. If by the fair exercise of their judgment the officers of the district determined that it was necessary to put six thousand cubic yards of excavated earth on the west side of the ditch as a levee in aid of the reclamation project, the jury in such a case as this cannot be permitted to question their decision or to say that less or more or none of the earth should have been there deposited. In this respect the instructions were erroneous. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued December 18, 1919, affirmed January 27, rehearing denied February 24, 1920.

FRIBERG v. BJELLAND.

(186 Pac. 1113.)

Specific Performance—Oral Lease for More Than One Year Specifically Enforced Because of Improvements by Tenant.

1. A court of equity will require specific performance of an oral lease for a term of more than one year, and therefore void under the statute of frauds, where the tenant has entered into the premises and has incurred expense in making valuable permanent improvements and changed his position to such an extent that a refusal on the part of the lessor to perform operates as a fraud on the rights of the lessee.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 2.

In the early part of the summer of 1917, the defendant, Mr. Bjelland, was the owner of several houses located on Lovejoy Street, in the City of Portland, Oregon. While he and Friberg, who is a contractor, were examining the house at 627 Lovejoy Street, Bjelland asked Friberg if he did not want to rent the house at 625 Lovejoy Street which became vacant the last of June, 1917. Bjelland offered him the house for \$20 per month. Friberg, after he and his wife inspected the house, informed Bjelland that it needed painting, tinting, a new closet and shelves put in, and several other things. Mr. Bjelland told Friberg that he could fix it up to suit himself, as long as he paid for such improvements. Mr. Friberg, in commenting on the amount of money it would be necessary to spend to put the house in condition for them to live in, said that if they moved they wanted to be sure that after spending this money, the rent would not be raised, and that they would have the place for six years. Bjelland assured Friberg that he could have the house for six years or more, for \$20 per month, "as long as they paid the

rent"; Friberg to pay for any and all repairs and alterations of the house. As a result of these negotiations, it was agreed between them that Bjelland would rent the house to Friberg for the period of six years, at a monthly rental of \$20 per month and that Friberg was to pay for any and all repairs and alterations that were put into the house.

At this same time Friberg agreed to repair and remodel Bjelland's house at 627 Lovejoy Street. He began this work shortly after the Fourth of July, and at the same time began to work on the house at 625 Lovejoy Street, pursuant to the contract. In the month of July, Friberg had the interior of the house painted and tinted, had some closets made in the house, put in some additional electric lights and wiring, spending about \$150 on the house before he moved in and paid his monthly rental of \$20. Thereafter, in carrying out the agreement, he spent about \$180 in various improvements and repairs on the house and premises. He had a garage built and painted, putting in a cement floor; had some old locks on the doors of the house replaced with new locks; had the porch fixed; had the furnace fixed; and in the following spring had the lawn resodded, and new screens made especially for the windows of the house.

June 1, 1918, Bjelland notified Friberg that the rent would be raised, refusing to accept the rent offered. Later he reconsidered and accepted the rent. August 1, 1918, he again refused to accept the rent tendered, and upon Friberg's refusal to pay the demanded increase, Bjelland brought an action of forcible entry and detainer in the District Court for Multnomah County, against Mr. Friberg; whereupon Mr. Friberg began this suit, seeking to restrain the prosecution of that action, and forbid Mr. Bjelland from interfering

with him in his possession of the premises, known as 625 Lovejoy Street, and compel Bjelland to specifically perform his agreement of lease. **AFFIRMED.**

For appellants there was a brief over the names of *Mr. M. B. Meacham, Mr. Emil P. Slovarp* and *Mr. S. B. Huston*, with an oral argument by *Mr. Meacham*.

For respondent there was a brief and an oral argument by *Mr. Oscar Furuset*.

There was a brief submitted over the name of *Mr. William C. Bristol, amicus curiae*.

BEAN, J.—1. A court of equity will require specific performance of an oral lease for a term of more than one year, and therefore void under the statute of frauds, where the tenant, relying upon that agreement has entered into possession of the premises and has incurred expenses in making valuable permanent improvements and changed his position to such an extent that a refusal on the part of the lessor to perform operates as a fraud on the rights of the lessee. Such part performance takes the contract out of the operation of the statute of frauds: *Wallace v. Scoggins*, 18 Or. 502, 504 (21 Pac. 558, 17 Am. St. Rep. 749); *West v. Washington Ry. Co.*, 49 Or. 436, 448 (90 Pac. 666); *McMahan v. Whelan*, 44 Or. 402 (75 Pac. 715); *Deeds v. Stephens*, 8 Idaho, 514 (69 Pac. 534); *Morris v. Herrick*, 130 Ill. 631 (22 N. E. 537, note in 3 L. R. A. (N. S.) 852); *Eaton v. Whitaker*, 18 Conn. 221, 230 (44 Am. Dec. 586).

An action at law would not afford the plaintiff adequate relief. It would be inequitable to permit the plaintiff to be ejected from the dwelling before the expiration of the time orally agreed upon for the lease.

There was a definite agreement, between the parties, for a lease for the term of six years at a rental of \$20 per month. By the terms of the lease, the lessee was to make whatever repairs or alterations he might desire, in order to fit the dwelling for use during that period. Relying upon the contract, and in compliance therewith, plaintiff took possession of the premises and within a short time expended the sum of \$330 in repairs and alterations of the house and the construction of a garage on the lot. Such outlay strongly indicates that Friberg had an understanding or contract with Mr. Bjelland for a lease of the premises for a period of more than one year, or he would not have expended a sum of money greatly in excess of one year's rental. The refusal by the defendant to perform the agreement operates as a fraud upon the rights of plaintiff.

We concur in the able opinion rendered by the learned trial judge, and affirm the judgment of the lower court.

AFFIRMED. REHEARING DENIED.

MCBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued January 20, affirmed February 24, 1920.

LATOURETTE v. NICKELL.

(187 Pac. 621.)

Executors and Administrators — Executor and Legatee Entitled to Appeal from Allowance of Claims Against Estate.

1. The executor and trustee of an estate as such may, in his representative capacity, appeal from an order allowing a claim against the estate, and where such executor was the next of kin and a beneficiary under the will, he has such an individual interest as will entitle him to appeal from the allowance of the claim.

Executors and Administrators—Executor's Appeal from Order Allowing Claim not Affected by Order Requiring Payment.

2. The right of an executor to appeal from an order of the county judge, directing him to pay a claim, given by Section 1241, L. O. L., cannot be abridged by the County Court by an order requiring him to pay the claim under penalty of removal.

Executors and Administrators—Payment of Claims Without Order of County Court No Ground for Removal.

3. That an executor paid out funds of the estate without order of the County Court is no ground for removal, in view of Section 1241, L. O. L., providing for payment of claims found just by the executor although the more prudent course is for an executor to procure an order of court before paying out money.

Executors and Administrators—Petition held to State Conclusions and No Ground for Removal of Executor.

4. A petition, stating that the executor wrongfully paid money to persons not entitled to the same, and that such moneys should have been paid to claimant, etc., does not state grounds for removal of the executor; the allegations being mere conclusions of the pleader.

From Yamhill: HARRY H. BELT, Judge.

Department 1.

This is an appeal from an order of the Circuit Court, sustaining a writ of review to the County Court of Yamhill County sitting in probate. The salient points in controversy may be briefly stated as follows:

On November 14, 1911, Willard H Latourette died testate in Yamhill County, and by his will appointed Lyman E. Latourette executor and also trustee of such part of his estate as should remain undisposed of after administration. Lyman T. Latourette was a son and next of kin to the deceased and a beneficiary under the will.

On November 2, 1909, Arthur C. Harlow and Willard H. Latourette executed their joint and several promissory note to Byron T. Randall, whereby they promised to pay to Randall the sum of \$800, with interest after

maturity at the rate of 6 per cent, and reasonable attorney's fees in case of suit.

In March, 1914, Byron T. Randall presented the note to Lyman E. Latourette, as executor, as a claim against the estate of Willard H. Latourette, and the claim was allowed in the sum of \$800.

On December 31, 1916, Randall died and his widow, Lucinda Randall, became executrix of his estate.

On May 8, 1917, Mrs. Randall, as executrix of Randall's estate, filed a petition setting forth substantially the foregoing facts in relation to the execution, presentation and allowance of the claim upon the \$800 note, and alleged that the estate was solvent and possessed of property of the value of forty thousand (\$40,000) dollars; that the executor had paid out a large amount of money upon claims which had never been filed or proven in the County Court, and had retained large sums of money in his own hands; that the executor had on hand sufficient funds to pay said claim, and that payment thereof had been demanded and refused, and prayed for an order citing the executor to appear and show cause why he should not pay said claim, and requiring him to pay it or be removed as executor.

To this petition the executor filed an answer, admitting the execution of the note, but alleged that Willard H. Latourette executed it only as surety for Arthur C. Harlow, and that said fact was at all times known to Byron T. Randall; admitted the presentation and approval of the claim for \$800, but alleged that said approval was obtained by fraud and misrepresentation of facts set forth in the answer, and through ignorance of the true conditions under which said note was obtained and held by Randall; denied that the estate was possessed of property of the value of \$40,000, or any

greater sum than \$11,950, which he alleged would probably, under favorable conditions, sell for a sum sufficient to pay all claims against the estate, but under conditions existing at the time of filing the answer it was alleged that it was doubtful if the property would be sufficient to pay all claims; denied that the executor had any funds whatsoever in his hands applicable to the payment of said claim, and admitted that payment thereof had been demanded and refused.

The answer then set up the following defense:

“That this executor is advised and believes and alleges the facts to be that the consideration for said note and the conditions thereof were and are as follows: On or about April 15, 1909, Byron T. Randall, being the owner of a certain lot 50 feet by 110 feet having a building thereon, at the northwesterly corner of Front and Hall Streets, in the City of Woodburn, Oregon, entered into a contract with one J. C. Gregory for the sale thereof to said Gregory for the sum of \$2,200, payable as in said contract provided; that thereafter, at or about the time of the making of said note said Gregory sold, assigned or transferred to said Arthur C. Harlow his right and interest in and to said contract; that said Gregory at or about the time of making said contract with said Randall gave to said Randall certain security, the exact nature of which is to this executor unknown, which security was collateral to said contract to guarantee the making of certain payments on the purchase price of said property by said Gregory; that at the time of said transfer to said Harlow it was agreed between said Randall and said Harlow that said Harlow should obtain and give to said Randall a promissory note in the sum of \$800 due in three years at 6 per cent interest with said W. H. Latourette as surety thereon, which note should be collateral security for the purpose only of guaranteeing payments on said contract by said Harlow to the extent of \$800, whereupon such note should be surrendered and canceled; that thereupon said Harlow obtained

such note, which is the same note set out in the petition herein and gave the same to said Randall to hold upon said terms and conditions, and thereafter said Harlow made payments on said contract from time to time up to and including February 17, 1915, which payments so made to said Randall aggregate more than the said sum of \$800, to wit: the sum of \$947 or more, and thereby said note was discharged and the same should be canceled.

"That this executor further alleges that he did not ascertain or learn the facts above stated until long after the receipt and approval of said note as a claim against the estate of said Willard H. Latourette, deceased; that said Randall at the time of presenting said note for approval as a claim against said estate, stated and represented to this executor that said note was given generally to guarantee all of the payments to be made on said contract, and your executor herein believed said representations and relied thereon and so approved said claim, whereas in truth and in fact said representations were and are false, and said note should not have been approved or allowed for more than the difference between the amount of such payments and the amount of said note, which difference was at that time the sum of \$66, or thereabouts, and thereafter further payments were made on said contract by said Harlow to said Randall amounting to \$240, or thereabouts, and thereupon said Harlow, being unable to continue making further payments, surrendered up and turned back said property to said Randall after having made permanent improvements thereon so that said property was of greater value when turned back to said Randall than when sold, and said Randall received and accepted the same, and thereby said Randall was and is estopped from attempting to obtain further payment on said contract by enforcing payment of said note."

On July 17, 1917, the court, on motion of petitioner, struck out that part of executor's answer, last above quoted.

The cause thereafter came on for hearing upon the petition and emasculated answer, and the court found substantially in conformity with the allegations of the petition, and on December 3, 1917, entered a decree directing the executor to pay to Lucinda Randall, as executrix, the sum of \$1,040 and costs and disbursements of the proceeding, and further decreeing that if he failed to pay the same within 30 days an order should be entered removing him as executor and appointing a successor as administrator, with will annexed, and that said executor make and file herein forthwith a full account of all the property of the estate; that the same be turned over to his successor, and that the executor account to him for all money and property coming into his hands as such executor and belonging to said estate; and, further, that said claim of said Byron T. Randall in the sum of \$1,040 is adjudicated and decreed to be a valid and legal claim against this estate, and said executor is adjudged to be estopped to further dispute the same or any part thereof.

On December 17, 1917, the executor served and filed his notice of appeal to the Circuit Court from said order and his undertaking on appeal, and the same was perfected before the expiration of the 30 days prescribed in the decree of December 3d. Thereafter and on January 4, 1918, the County Court made an order reciting the decree of December 3d, and further reciting that the executor had wholly failed and refused to comply therewith and wholly failed to pay said claim, and that Lucinda Randall was entitled to an order carrying the same into effect, it was adjudged that the executor be removed, and that M. D. Warren be appointed executor in his stead.

Thereupon Lyman E. Latourette, trustee, and Lyman T. Latourette, the next of kin of deceased and one of

the beneficiaries under the will, sued out this writ of review to the Circuit Court for alleged error in the proceedings in the County Court, as the matter hereinbefore recited. Upon the hearing the court sustained the writ set aside and annulled the decree and order of the County Court removing the executor, from which decree the petitioner in the probate proceedings appeals to this court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Frank Holmes*.

For respondent there was a brief and an oral argument by *Mr. Lyman E. Latourette*.

McBRIDE, C. J.—1. A preliminary question is raised by the appellants as to the sufficiency of the parties. The record shows that Lyman E. Latourette is the trustee named in the will of Willard H. Latourette, as well as the executor, and that Lyman T. Latourette is the son and next of kin of the testator. Both of these have such an interest in the disposition and management of the estate as entitle them to sue out a writ of review when it appears the inferior court has exercised its functions erroneously to their prejudice. Lyman E. Latourette, the executor removed by the order and trustee under the will, had a clear right to have the proceedings reviewed, and the other petitioner, being a beneficiary under the will and *prima facie* entitled to administration as next of kin in case of the removal of the executor, would seem to have such an interest. Both are parties to the record to the extent at least that an order of the court, which removes an executor for appealing from an order requiring him to pay a disputed claim, the executor has a right, under the statute, to appeal to the Circuit Court, and in cases where he has

a *bona fide* doubt as to the justice of the claim or the correctness of the decision, it is his duty so to appeal in the interest of the beneficiaries of the estate.

2. We do not now pass upon the sufficiency of the matter in the answer stricken out by the County Court; that will come before the Circuit Court in due course upon the appeal taken from the County Court. It presents a close question and one which the executor had a right to litigate. The right of appeal by the executor from the order directing him to pay the claim is given by Section 1241, L. O. L., and the County Court cannot abridge that right by requiring him to pay under penalty of removal.

3, 4. The petition filed by Mrs. Randall was not sufficient to show cause for removal of the executor. It is alleged, first, "that since the appointment of said executor, Lyman E. Latourette, * * he has paid out large sums of money to divers persons without the order of this court." There is no statute requiring the executor to obtain an order of court to pay money upon approved claims. Section 1241, L. O. L., provides

"When the claim is presented to the executor or administrator, as prescribed in the last section, if he shall be satisfied that the claim thus presented is just, he shall indorse upon it the words 'examined and approved,' with the date thereof, and sign the same officially, and shall pay such claim in due course of administration."

Of course it is the better and more prudent course to obtain an order of the County Court directing the payment of a claim, or otherwise it might happen in the course of administration that the County Court would take a different view as to the justice of the claim from that taken by the executor, and he and his bondsmen find themselves required to make good an amount paid upon an illegal or improper claim, but there is no law

absolutely requiring an order of court before paying a claim.

The petition further alleges "that said sums of money have been wrongfully paid to persons not entitled to the same," which is a mere legal conclusion, and, further, that said sums of money "should have been paid to and upon the claim of Byron T. Randall," which is another legal conclusion from the first, and that "large sums of money have been wrongfully paid out upon claims not filed or approved by the court." Such filing and approval not being required, as before shown. To say that a thing is done or omitted "wrongfully" is usually a mere legal conclusion, a mild vituperative epithet, and adds nothing to the force of a pleading, except in those rare cases where the statute has expressly made that mode of pleading sufficient.

To remove an executor selected by a person to administer and care for his affairs, when he shall be dead, and substitute in his place a stranger, the petition should show, not by legal conclusions, but by explicit instances, if possible, the unlawful acts complained of, and they should certainly go further than to show a mere refusal to pay a disputed claim.

It is apparent from the record here that the whole object of the proceeding was to compel the executor to pay a disputed claim, and that his removal was because he refused to obey the order of the court requiring him to do so. Learned counsel for the appellant in his final summing up practically announces this to be his view. He says:

"The only question here is, Did the court, in making the order of removal, have jurisdiction, that is: legal power to remove him for his failure to perform the order directing him to pay the Randall claim out of the funds of said estate. If the court had the legal right to pass on that question and grant the relief

prayed for in Mrs. Randall's petition, whether he decided right or wrong on that question is not reviewable here if the court had the power to make an order on said petition at all."

This statement of the case is correct, but the conclusion is a *non sequitur*.

The court did have power to hear the petition and to direct the executor to pay the claim, but it did not have power to make a failure to obey the order a cause for removal in the first instance, or to remove him by means of the subsequent order after he had taken an appeal, which he had a perfect right to take.

We have refrained from discussing the merits of the controversy here, or the sufficiency of the defense set up by the executor in the County Court. These matters are now pending in the Circuit Court upon appeal and should be settled there.

Upon the instant case we are clear that the order of the Circuit Court should be affirmed, and it is so ordered.

AFFIRMED.

BENNETT, HARRIS and BEAN, JJ., concur.

Motion to dismiss cross-appeal submitted September 3, dismissed September 24, 1918, argued on the merits January 21, affirmed March 2, 1920.

JUBITZ v. GRESS.
HIBERNIA SAVINGS BANK v. GRESS.*

(175 Pac. 79; 187 Pac. 1111.)

Appeal and Error—Notice of Appeal—Acceptance of Service by Attorney.

1. Where attorney for three defendants admitted service of notice of a cross-appeal by another defendant, signing himself as "attorney for [one of his clients] et al.," the acceptance of service was sufficient only as to the named client.

*As to question as to whether liquor license is an asset, see note in 2 L. E. A. (N. S.) 626. **REPORTER.**

Appeal and Error—Notice of Appeal—"Adverse Party."

2. Three defendants, in suits to foreclose mortgages, who appealed, held "parties adverse" to another defendant, cross-appellant, who failed to give them notice of his appeal, as required by statute; an "adverse party" being any party whose interest is in conflict with modification or reversal of the decision.

ON THE MERITS.**Action—Pleadings in Mortgage Foreclosure Suit Construed to Allege but a Single Cause of Action.**

3. In a suit to foreclose a mortgage securing a lease of a hotel and by contract also securing repayment to an estate of money loaned to prior lessee for a liquor license, which license was transferred to lessee, who thereby secured a new license, the estate filing a cross-complaint setting up its interest, there was no improper joinder of causes of action, as the default entitling complainant and cross-complainant to a foreclosure was the one cause of action.

Mortgages—Failure to Make Agent a Party in Foreclosure not Fatal, Where Principal is a Party.

4. In mortgage foreclosure suit, an agent of a party known by defendant to be an agent need not be made a party, as principal is real party in interest.

Intoxicating Liquors—Unincorporated Trustees of Estate Operating Brewery not Forbidden by Ordinance to Have Retail License—"Association."

5. Unincorporated trustees of an estate, operating brewery of deceased, do not come within the terms of an ordinance, providing that no retail liquor license shall be granted either by original issue or transfer to any corporation, copartnership, or association of persons, but the same may be granted to the individual members of a firm or copartnership, as an association may be defined to be a body of persons acting together without a charter, but on the methods and forms used by incorporated bodies for the prosecution of the common enterprise.

Intoxicating Liquors—Transfer of Retail License by Authorization of Trustees of an Estate Having Equitable Interest in License not Invalid.

6. A contract whereby trustees of an estate of a deceased brewer, who had advanced money to lessee of hotel to procure a liquor license, permitted the lessee to transfer the license to another lessee on consideration that they would be protected by the mortgage given by such latter lessee to owner of hotel was not an invalid transfer of a liquor license; the ordinance expressly authorizing transfer of licenses, and trustees not coming within prohibited class mentioned in the ordinance.

Mortgages—Want of Consideration must be Pleaded.

7. Want of consideration to be a defense to action on note and to foreclose mortgage must be pleaded.

Mortgages—By Mother-in-law of Lessee to Secure Performance of Lease Supported by Sufficient Consideration.

8. Mortgage, given by mother-in-law of a lessee of hotel to secure performance of lease in consideration of the leasing of the hotel and the transfer of the liquor license to lessees, was supported by sufficient consideration.

From Multnomah: JOHN P. KAVANAUGH, Judge.

This is a motion to dismiss an appeal. The facts are as follows: This cross-appeal is from a decree of the Circuit Court for Multnomah County in two causes consolidated by the court into one. Both causes originated in suits to foreclose mortgages upon a tract of real property in Multnomah County. Cross-appellant, Julius Haase, was a defendant in each suit, and by answers and cross-complaint claimed a lien upon the real property prior to those of the plaintiffs in the two suits and alleged that a conveyance of the land in question from Fred Brakebush and Minnie Brakebush to Karoline Janicke was in fraud of creditors, and prayed that it be set aside. The decree of the Circuit Court gave a personal judgment to plaintiff, Hibernia Savings Bank, against Karoline Janicke, Fred Brakebush and Minnie Brakebush; also a personal judgment in favor of plaintiffs, Jubitz and Everett, against Fred Brakebush and George Gress; also a personal judgment in favor of defendants. Louise Weinhard, Anna Wessinger, Paul Wessinger and Henry Wagner, executrices and executors, respectively, of the last will and testament of Henry Weinhard, deceased, against George Gress, Fred Brakebush, Minnie Brakebush and Karoline Janicke. The decree then directed the foreclosure of the two mortgages and provided that the proceeds of the sale, after the payment of the expenses of the sale, be applied:

First, to pay the judgment of Hibernia Savings Bank against Karoline Janicke, Fred Brakebush and Minnie Brakebush;

Second, to pay the judgment of R. G. Jubitz and E. Everett against Fred Brakebush and George Gress;

Third, to pay the judgment in favor of the said executors and executrices of the last will and testament of Henry Weinhard, deceased, against George Gress, Fred Brakebush, Minnie Brakebush and Karoline Janicke;

Fourth, to the payment of the amounts found due defendant, John Ker, Trustee.

The decree further declared valid the conveyance from Fred Brakebush and Minnie Brakebush to Karoline Janicke, which cross-appellant, Julius Haase, had alleged to be in fraud of creditors. The decree further enjoined defendants, George Gress, Karoline Janicke, Julius Haase, the present cross-appellant, and Otto Ganguin, from asserting any right, title or interest in or to said real property. From this decree defendants, George Gress, Fred Brakebush, Minnie Brakebush and Karoline Janicke, appealed. Following their appeal defendant Julius Haase also served a notice of appeal, which is not directed to nor was it served upon defendant, George Gress. The attorney for Fred Brakebush, Minnie Brakebush and Karoline Janicke admitted service, signing himself as "Attorney for Fred Brakebush et al.," and no other or different service was made upon Minnie Brakebush or Karoline Janicke. CROSS-APPEAL DISMISSED.

For the motion: *Messrs. Clark, Skulason & Clark*, for Jubitz and Everett.

Messrs. Wood, Montague & Hunt and *Mr. M. M. Matthiesen*, for Louise Weinhard et al.

Messrs. Wilbur & Spencer and Mr. F. C. Howell,
for John Ker, Trustee.

Mr. W. C. Campbell, for appellants.

Messrs. Schmitt & Schmitt, for Otto Ganguin.

Mr. A. C. Spencer and Mr. John F. Reilly, for
Hibernia Savings Bank.

Contra, Mr. Arthur Gotzhausen and Mr. Arthur
Langguth, for cross-appellant.

McBRIDE, C. J.—1. There was no service of the notice of the cross-appeal upon defendant Gress, and the acceptance of service by Campbell was only sufficient as to Fred Brakebush. The addition of the observation "*et al.*" does not indicate with sufficient certainty who the attorney was attempting to represent: *Brabham v. Custer County*, 3 Neb. Unof. 801 (92 N. W. 989); *Mutual Bldg. L. & I. Co. v. Dickinson*, 112 Ga. 469 (37 S. E. 713); *Swift v. Thomas*, 101 Ga. 89 (28 S. E. 618); *Breidenthal v. McKenna*, 14 Pa. 160. It is manifest therefore, that if Gress, Minnie Brakebush and Karoline Janicke are "adverse parties," this cross-appeal must fail.

2. The term "adverse party" is succinctly defined in *Moody v. Miller*, 24 Or. 179 (33 Pac. 402). "An adverse party," within the meaning of this statute, "is every party to an action, suit or proceeding whose interest in respect to the final determination rendered therein, is or might be in conflict with a modification or reversal of the decision, order, judgment, or decree so given or rendered."

The reasons for holding that Gress, Minnie Brakebush and Karoline Janicke are adverse parties are set

forth in the brief of the Hibernia Savings Bank, as follows:

"Defendant Karoline Janicke claimed to own the land, mortgages upon which were foreclosed in the decree of the lower court and which was directed to be sold and the proceeds applied to the payment of the claims of the Hibernia Savings Bank, of Jubitz and Everett, and of the executrices and the executors of the will of Henry Weinhard, deceased. Deficiency judgments were also secured against Karoline Janicke by Hibernia Savings Bank and by the executrices and executors of the last will of Henry Weinhard, deceased. In the decree, cross-appellant Haase was enjoined from asserting any further claim to the real property in question. In his appeal he is seeking to have his alleged lien on the real property reinstated and given priority over all other liens against said property, and he is also trying to have decreed fraudulent the deed by which Karoline Janicke took title to the real property in question. From this it is apparent that Karoline Janicke was and is an adverse party. If he prevails in his appeal, property claimed by her will be subjected to his lien. If he prevails in his appeal his lien will be decreed prior to those of the other lienholders, thus exhausting the proceeds of the sale of the land that much quicker and making it more likely that she will have to pay the deficiency judgment rendered against her and in favor of the Hibernia Savings Bank and the executrices and executors of the will of Henry Weinhard, deceased.

"Minnie Brakebush to whom the notice of appeal was directed but upon whom, so far as the proof of service shown on the notice indicates, it was not served, is also an adverse party. Deficiency judgments were given against her and in favor of Hibernia Savings Bank and the executrices and executors of the will of Henry Weinhard, deceased. If cross-appellant Haase prevails in his appeal, an additional claim will be imposed upon the fund arising from the sale of the mortgaged property, thus exhausting that fund more

quickly and making it more probable that Minnie Brakebush will be forced to pay the deficiency judgments rendered against her.

"No notice of appeal was directed to, nor was any served on George Gress. Deficiency judgments were also pronounced against George Gress in favor of R. G. Jubitz, E. Everett and the executrices and executors of the will of Henry Weinhard, deceased. As with Minnie Brakebush and Karoline Janicke, Gress' obligation to pay these deficiency judgments will arise only in the event that the sale of the mortgage premises will not produce a sum sufficient to satisfy the claims of the Hibernia Savings Bank, Jubitz and Everett and of the Weinhard Estate. If cross-appellant prevails and his lien is placed ahead of those of the bank, of Jubitz and Everett and the Weinhard Estate, then the probability of Gress being forced to pay the deficiency judgments against him will be enhanced. It is clear, therefore, that he would be injuriously affected by the reversal of the decree as asked by cross-appellant Haase. He is an adverse party and no notice having been served upon him the appeal should be dismissed."

This argument appears to be sound and conclusive, therefore the cross-appeal is dismissed.

CROSS-APPEAL DISMISSED.

Argued January 20, affirmed March 2, 1920.

ON THE MERITS.

(187 Pac. 1111.)

Department 1.

This proceeding is a consolidation of two suits for the foreclosure of two mortgages which are liens upon the same property, and involving the same parties. On April 30, 1914, the plaintiffs, Jubitz and Everett,

filed their complaint for the foreclosure of a mortgage upon the property of the defendant Karoline Janicke, for the sum of \$5,000, in which they claimed a beneficial interest to the extent of about \$2,000. There were a number of parties named as defendants, including the executors and executrices of the estate of Henry Weinhard, deceased. On April 8, 1915, the Hibernia Savings Bank filed its complaint in foreclosure of a mortgage upon the same real property, making all of the parties to the prior suit parties defendant. Upon this appeal, all of the parties have been eliminated except the plaintiffs Jubitz and Everett, and the defendants Gress, Brakebush, Janicke, and the representatives of the Weinhard Estate, and therefore it is necessary to state the issues only as between these. The executors and executrices of the Weinhard Estate will be referred to hereafter, for brevity, as the Weinhard Estate. From the pleadings, which are somewhat involved, it appears that early in 1912, the defendants George Gress and Fred Brakebush entered into a contract with the plaintiffs whereby they leased from the latter the "Enterprise Hotel," a rooming-house in Portland, in which, at the time, there was maintained by the prior lessees, a saloon for the retail sale of liquors under a liquor license issued in the name of C. W. Splawn, one of such prior lessees. The Weinhard Estate had advanced the money to Splawn with which to purchase the license, and the latter and his partner had not repaid the loan, so when they quit the premises they agreed to assign the license to any party designated by one Emil Glutsch, an agent of the Weinhard Estate, who, as such agent designated the defendants Gress and Brakebush, to whom it was duly transferred, so that a new license might be issued to the latter in compli-

ance with the city ordinances governing such transfers, and at the same time there was executed between them a written contract in which it was recited that Glutsch was the equitable owner thereof, and that they were to pay therefor the sum of \$2,800 in monthly installments, and the agreement contained other covenants, among which was that the defendants would protect the license from lapsing by making the necessary periodical payments to the city. At the same time there was executed by the defendant Karoline Janicke, the mother-in-law of Fred Brakebush, a promissory note in the sum of \$5,000, secured by a mortgage upon certain real property to which she held the legal title, the note being made payable to the representatives of the Weinhard Estate, the mortgage being the one involved in this litigation. At the same time another written agreement was entered into by all of the parties to this appeal, wherein it is recited that the above-mentioned mortgage was given to secure the performance by Gress and Brakebush of their agreement in relation to the liquor license and also the rentals to become due to Jubitz and Everett under the lease of the Enterprise Hotel. The enterprise of conducting the hotel and saloon was not a success. The Weinhard Estate filed an answer, setting up its interest in the mortgage as aforesaid, alleging that Gress and Brakebush had made no payment on the license, and, by their failure to make the periodical payments to the city, had allowed the license to lapse, and therefore asked for a decree in its favor for the amount due thereon and a sale of the mortgaged premises.

The defendants answered, contending that the contract between them and Glutsch relating to the liquor license was in violation of the municipal ordinance

regulating the issue and transfer of such licenses, and therefore contrary to public policy; that the defendant Karoline Janicke is nearly 80 years of age, does not speak or understand the English language, and that at the time she executed the instruments mentioned in the pleadings she did not know what she was signing and that it was represented to her that the instruments were merely a matter of form, to enable Gress and Brakebush to enter into possession of the hotel until the written lease should be prepared and executed, and that her liability was only for such rental as might accrue in the interval pending the execution of the written lease. There is also pleaded a release of the obligation to the Weinhard Estate by a subsequent parol agreement, to the effect that if defendants would handle Weinhard beer exclusively, they would not be required to comply with the terms of their contract in relation to the license; that they accepted this proposition and that they are no longer under any obligation to the Weinhard Estate. It is further averred, as to the claim for rentals, that when they were in arrears thereon, the plaintiffs elected to treat the written lease as breached, and agreed to surrender the security and thereafter to treat the defendants as tenants from month to month, and to allow them credits for moneys expended in repairs and improvements.

A trial being had, there was a decree in favor of the plaintiffs and the Weinhard Estate for the sums found due to each, respectively, and foreclosing the mortgage, and the defendants Gress, Brakebush and Janicke appeal.

AFFIRMED.

For appellants there was a brief over the names of *Messrs. Crawford & Crawford* and *Mr. W. C. Camp*.

bell, with oral arguments by *Mr. Andrew M. Crawford* and *Mr. Campbell*.

For respondents there was a brief over the names of *Messrs. Wood, Montague & Hunt* and *Mr. M. M. Matthiessen*, with an oral argument by *Mr. Matthiessen*.

BENSON, J.—The first assignment of error is that the court overruled the demurrers to the complaint and to the Weinhard Estate's cross-complaint. These demurrers are based upon the theory: (a) That there are several causes of suit improperly united; (b) that Emil Glutsch, who as agent of the Weinhard Estate, entered into the option contract for the purchase of the liquor license, is a necessary party; (c) that the complaint discloses that a large part of the consideration for the note and mortgage consists of the transfer of a liquor license in violation of a municipal ordinance, and is therefore against public policy and avoids the entire transaction.

3. As to the first of these contentions, it is sufficient to say that the one cause of suit alleged in the pleadings is the default entitling plaintiffs and cross-complainants to a foreclosure of the mortgage.

4. As to the second point, that Emil Glutsch was a necessary party, it sufficiently appears from the pleadings that he was acting as the agent of the Weinhard Estate, and that this fact was known to the defendants, and that the Weinhard Estate was the real party in interest.

5, 6. The defendants' most serious contention is, that the complaint discloses a contract which is in violation of an ordinance of the City of Portland, and therefore in contravention of public policy. In support of this

contention, defendants direct our attention to a clause in the ordinance which reads thus:

"No retail liquor license shall be granted either by original issue or transfer, to any corporation, copartnership or association of persons, but the same may be granted to the individual members of a firm or copartnership."

It will be observed that the cross-complainant, Louise Weinhard, Anna Wessinger, Paul Wessinger and Henry Wagner, are parties to the suit by virtue of their position as executors of the last will and testament of Henry Weinhard, deceased, who, during his lifetime, was the owner of a brewery. They do not appear in the pleadings as a corporation, or as an association, but as the trustees of the estate of a decedent. It does not appear, therefore, that they come within any of the classes to whom the issuance of a liquor license is prohibited. Nor is there anything in the evidence that brings them within the prohibited classes. It is made to appear that they were not incorporated, nor does it appear that they were an organized association for the carrying on of a business enterprise. The term "association," as used in the ordinance, evidently applied to the legal definition thereof, which in 4 Cyc. 301, reads thus:

"An association may be defined to be a body of persons acting together, without a charter, but upon the methods and forms used by incorporated bodies, for the prosecution of the common enterprise."

The personal representatives of Henry Weinhard, deceased, were not such an organization. After the death of the testator, they continued the business of their testator, under directions and conditions of which we are not advised, and might much more accurately be classed as a copartnership, but in any event, they are

not within the prohibited class, and like partners, they might in their personal capacity, have held a liquor license without violating the law. However, they did not undertake to do so. They advanced the money to Mills & Splawn, to purchase a license, and entered into an agreement with them whereby they held a lien thereon for the repayment of the money so advanced. Mills & Splawn did not repay the money, and subsequently, through Glutsch, acting for the estate, complied with the terms of their contract by assigning their license to Gress and Brakebush, who, in turn assumed the obligation of repaying the money to the estate. It must be borne in mind that the ordinance of the City of Portland, regulating the issue of liquor licenses, made express provisions for the transfer and assignment of such licenses, thereby making such permits a species of property, subject to lawful bargain and sale, and assets which might be subjected to liens: *Deggender v. Seattle Brewing & Malting Co.*, 41 Wash. 385 (83 Pac. 898, 4 L. R. A. (N. S.) 626).

7, 8. It is next urged that the defendant Janicke did not know what she was signing, and that the contents of the contracts signed by her were misrepresented to her. This contention is not supported by the evidence.

It is also maintained that no notice was ever given to Mrs. Janicke of the default of Gress and Brakebush. The sufficient answer to this is that the supplemental agreement signed by her expressly waives such notice.

There was some argument by defendants' counsel to the effect that the note and mortgage are not valid, for the reason that no consideration is shown to have passed to Mrs. Janicke for the execution thereof. To this it may be said that the defendants have not pleaded a want of consideration, and therefore cannot now be heard upon that point: 9 Cyc. 737. However, if de-

feudants had pleaded a want of consideration, the evidence discloses that the consideration for the note and mortgage was the leasing of the hotel and the transfer of the liquor license to Gress and Brakebush, and such consideration is ample. In 9 Cyc. 311, the doctrine is formulated thus:

"It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction."

In conclusion we may say that we have examined the evidence very carefully, and are satisfied that the findings and decree of the trial court are correct. The decree is therefore affirmed.

AFFIRMED.

McBRIDE, C. J., and HARRIS and BURNETT, JJ.,
concur.

Argued November 12, 1919, modified January 13, rehearing denied
March 2, 1920.

CORNELY v. CAMPBELL.*

(186 Pac. 563.)

Vendor and Purchaser—Payments Recoverable upon Rescission by Agreement or Rescission by Vendor.

1. Generally, if land sale contract is rescinded by mutual arrangement and consent, without any agreement for forfeiture, or by wrongful act of the vendor, acquiesced in by the purchaser, purchaser is entitled to recover payments made by him.

Vendor and Purchaser—No Recovery of Payments by Purchaser upon Forfeiture for His Default.

2. Where vendor does not waive purchaser's default, but declares a forfeiture under contract providing therefor and making time of the essence of the contract, purchaser cannot recover payments already made.

*On right of vendee to recover payments made, on rescission of contract by vendor, see note in L. R. A. 1918B, 547. **REPORTER.**

Trial—Requested Instructions as to Right to Recover Payment Improper as Ignoring Other Party's Theory of the Case.

3. In purchaser's action to recover payment on ground of rescission, where vendor denied rescission and claimed a forfeiture for non-payment of installment due subsequent to alleged rescission, requested instruction that purchaser could not recover if defendant retook property upon default by purchaser *held* improper in ignoring purchaser's theory of the case.

Vendor and Purchaser—Evidence Sufficient to Warrant Instruction as to Wrongful Repudiation of Contract by Vendor.

4. In purchaser's action to recover payment on ground of mutual rescission, instruction that vendor's wrongful repudiation of contract acquiesced in by purchaser effected a mutual rescission *held* warranted by the evidence.

Vendor and Purchaser—Purchaser Recovering Payment not Entitled to Interest.

5. Purchaser is not entitled to interest on payment recovered following mutual rescission of contract.

Vendor and Purchaser—Wrongful Declaration of Forfeiture Entitled Purchaser to Treat Contract as Ended.

6. If vendor under contract giving him the right to declare a forfeiture wrongfully declared a forfeiture where in fact no ground existed therefor, the attempted forfeiture was in effect a refusal to proceed further with the contract entitling purchaser to stand upon his rights under the contract or treat it as ended.

Vendor and Purchaser—Instruction not Objectionable in Purchaser's Action to Recover Payment Made.

7. In purchaser's action to recover payment on ground of mutual rescission, where vendor denied rescission and claimed forfeiture for default in payment due subsequent to date of alleged rescission, instruction *held* not subject to objection that it submitted question whether there was a default on such subsequent date.

Appeal and Error—Appellant not Prejudiced by Instruction Leaving to Jury Undisputed Fact of Default by Other Party Waived by Appellant.

8. In purchaser's action to recover land contract payments on ground of mutual rescission, although evidence of at least a technical default by plaintiff appellee prior to date of alleged mutual rescission was undisputed, appellant was not injured by an instruction leaving to the jury the question whether or not there was such a prior default, where the evidence and pleadings showed conclusively that such prior default had been waived.

Vendor and Purchaser—No Forfeiture After Waiver of Default Without Giving Purchaser Opportunity to Perform.

9. Vendor could not declare a forfeiture for default which he had waived without first giving purchaser notice and an opportunity to perform.

Vendor and Purchaser—Acceptance of Overdue Payment Waiver of Default.

10. Vendor's acceptance of payment after due date amounted to a waiver of purchaser's default in making payment at specified time.

Pleading—Defect in Complaint of Purchaser Suing for Payment Cured by Answer.

11. In purchaser's action to recover payment on ground of mutual rescission of contract, failure of plaintiff to allege that a default on payment at specified time had been waived was cured by defendant's answer showing that payment had been accepted, and therefore that default had been waived.

Vendor and Purchaser—Evidence of Quality of Land Admissible in Purchaser's Action to Recover Payment for Mutual Rescission.

12. In purchaser's action to recover payment on ground of mutual rescission, where complaint alleged the land was of poor quality, so that the value of the use of the land during the time the plaintiff purchaser was in possession was negligible, and, not equaling the value of improvements made and work done on the land by plaintiff, together with plaintiff's expenses, no accounting was necessary to place defendant in *status quo*, and such allegation was denied, evidence as to quality of the land *held* admissible.

Evidence—Answer in Former Action Between the Parties Admissible as an Admission.

13. In purchaser's action to recover payment on ground of mutual rescission of contract in year of 1912, where vendor denied such rescission and claimed a forfeiture in year 1913, an answer by vendor in a previous suit between the parties *held* admissible as an admission for purpose of showing from allegations therein that contract was rescinded in 1912.

Appeal and Error—Admission of Evidence as to Conversation Between Parties at Making of Contract Harmless Action to Recover Payment Made Under Contract.

14. In purchaser's action to recover payment on ground of mutual rescission of contract, involving issue of whether contract was rescinded or forfeited, admission of evidence as to a conversation between the parties at time of original transaction with reference to recording of the contract *held* not prejudicial to vendor.

Appeal and Error—Defendant's Evidence Considered in Passing upon Action of Court in Denying Nonsuit.

15. Where defendant has not rested on a motion for a nonsuit, but has introduced testimony in his own behalf, that evidence can be considered to sustain a recovery on the part of the plaintiff.

Evidence—Credibility of Witness for Jury.

16. Jury had a right to believe either of two witnesses giving conflicting testimony or to believe part of the testimony of each one of the witnesses and disbelieve the remainder of their testimony if they thought it was unreasonable or if there was a conflict between it and other direct testimony.

Vendor and Purchaser—Whether Mutual Rescission or Forfeiture for Jury.

17. In purchaser's action to recover payment made on ground of mutual rescission, where vendor denied mutual rescission and claimed a forfeiture, evidence held sufficient for submission of case to jury.

Appeal and Error—Court will Eliminate Objectionable Interest Allowed by Judgment Instead of Reversing.

18. Under constitutional amendment of 1910 (Article VII, Section 3) giving Supreme Court right to eliminate objectionable portion of judgment, the court, in holding the judgment erroneous in including interest, will deduct from judgment the amount that might have been allowed as interest and affirm judgment as modified subject to respondent's acceptance of such reduction.

ON PETITION FOR REHEARING.**Vendor and Purchaser—Complaint to Recover Payment on Land Contract Held to Allege Mutual Rescission.**

19. A complaint to recover payment made on a contract for the purchase of land, which alleged that defendant repudiated the contract, and that plaintiff had elected to accept defendant's repudiation as a mutual rescission, is sufficient, in the absence of a motion to make more definite and certain, to allege rescission by mutual agreement, though the plaintiff's election was not alleged to have been made at the time of defendant's repudiation.

Appeal and Error—Finding Necessary to General Verdict must be Assumed, if Evidence Could Support it.

20. If the evidence could on any reasonable hypothesis support a finding for plaintiff on a material issue, such finding by the jury must be assumed to support the general verdict for plaintiff.

Vendor and Purchaser—Testimony of Defendant as to Rescission Held Sufficient to Support Finding Against Him.

21. Testimony by defendant vendor that he had declared a land purchase contract forfeited and had burned it up, and that he had notified plaintiff to move off the land, which plaintiff agreed to do as soon as he could rent a place, is sufficient to support a finding of mutual rescission in an action to recover payments made by plaintiff.

Appeal and Error—Contentions of Party are not Binding on Court.

22. It is no ground for rehearing that the opinion does not follow the contentions of counsel for the successful party, since the court is governed by fixed principles of law, not by the contentions of counsel.

Vendor and Purchaser—Vendor's Words or Conduct Indicating Intention not to be Bound Warrant Rescission by Purchaser.

23. Words or conduct by the vendor, indicating an intention to be no longer bound by the contract, is a sufficient repudiation to warrant the other in rescinding.

From Marion: PERCY R. KELLY, Judge.

Department 2.

This is an action brought by the plaintiff to recover the value of certain land in Marion County, Oregon, turned in to the defendant by him, as a part payment upon a certain other tract of land situated in Polk County, Oregon, which he was purchasing from the defendant.

The provisions of the contract, which are material upon this appeal, are as follows:

“THIS AGREEMENT, made this 11th day of Feb. 1911, between H. G. Campbell of the county of Polk, State of Oregon, party of the first part, and Joseph A. Cornely, of the second part, witnesseth; that in consideration of stipulations herein contained and payments to be made, as hereinafter specified, the party of the first part hereby agrees to sell unto the party of the second part, the following described real property: * * For the sum of Twelve thousand five hundred Dollars, on which said party of the second part has paid the sum of Three thousand five hundred Dollars, and the said party of the second part, in consideration of the premises, hereby agrees to pay to the said party of the first part at Dallas, Polk County, Oregon, the remaining principal, with interest at the rate of 6 per cent per annum, at the times and in the manner following: \$1000.00 Jan. 1st 1913—\$500.00 Jan. 1st 1914—\$500.00 Jan. 1st 1915—\$500.00 Jan. 1st 1916—\$500.00 Jan. 1st 1917 and \$500.00 of said principal on the first day of Jan. for each and every year thereafter, together with all accrued interest to be paid on the first day of Jan. for each and every year from the date hereof until the full amount of principal and interest is paid. * *

“All improvements placed thereon shall remain and shall not be removed before final payment be made for above described premises. In case the said party of the second part, his legal representatives or assigns, shall pay the several sums of money aforesaid, punctually and at the several times above specified, and

shall strictly and literally perform all and singular, the agreements and stipulations aforesaid, according to the true intent and tenor thereof, then the said party of the first part will make to the said party of the second part, his heirs or assigns, upon request and upon the surrender of this agreement, a deed conveying said premises in fee simple with the ordinary covenants of Warranty; excepting however, from the operation and subject matter of said covenants, the before mentioned taxes and assessments and all liens and encumbrances created or imposed by said party of the second part or his assigns. But in case said party of the second part shall fail to make the payments aforesaid, or any of them, punctually and upon strict terms, and the times above specified, without any failure or default, the time of payment being declared to be the essence of this agreement, then the party of the first part shall have the right to declare this agreement null and void, and in such case all the rights and interest hereby created or then existing in favor of the said party of the second part, or derived under this agreement shall utterly cease or determine, and aforesaid premises shall revert to and revest in said party of the first part, without any declaration of forfeiture or act of re-entry, or without any other act by said party of the first part to be performed, and without any right of the said party of the second part of reclamation or compensation for money paid on improvements as absolutely, fully and perfectly as if this agreement had never been made."

The plaintiff alleges in substance that some time in the fall of 1912, the defendant "decided to abandon and repudiate said contract and to deprive the plaintiff of his interest thereunder," and rescinded the same, and that the plaintiff acquiesced in said cancellation and rescission, and that the contract was thereby ended, and the plaintiff brings this action to recover \$3,500, the alleged value of the Marion County property transferred to the defendant.

The defendant, on the other hand, while admitting the contract had been terminated, claims and alleges that it was terminated by the failure of plaintiff to make his payments, as provided in the contract, and by a forfeiture of the contract, declared by the defendant on account of such failure.

The case was tried before a jury who returned a verdict in favor of the plaintiff for \$3,500 and \$150 interest, and there was a judgment on the verdict, from which the defendant appeals to this court.

The defendant moved for a nonsuit and for a directed verdict in the court below, both of which motions were overruled, and the ruling upon these motions is assigned as error here.

The appellant also alleges error of the court below in the giving and refusing of instructions and in certain rulings upon the admission of evidence.

MODIFIED.

For appellant there was a brief with oral arguments by *Mr. Oscar Hayter* and *Mr. Arthur L. Veazie*.

For respondent there was a brief over the names of *Mr. Walter C. Winslow* and *Messrs. Smith & Shields*, with oral arguments by *Mr. Winslow* and *Mr. Roy F. Shields*.

BENNETT, J.—The case, as submitted to the jury, seems to have turned upon the question of whether the contract was terminated by a mutual agreement to rescind, upon the one hand, or by a rightful declaration of forfeiture, for nonfulfillment by the purchaser upon the other.

1. It seems to have been assumed by the court below that if the contract was rescinded by mutual arrange-

ment and consent, without any agreement for forfeiture or by the wrongful act of the defendant, acquiesced in by the plaintiff, the parties were entitled to be placed *in statu quo*, and that the plaintiff would then be entitled to recover the value of the property turned in by him as a payment. (The defendant having disposed of that property before the commencement of this action.) This view of the law seems to be sustained by the authorities.

In 39 Cyc. 2001, it is said:

“When the proposed contract * * has been rescinded by mutual consent, by the vendor, or by the purchaser under a right to do so, the purchaser may sue the vendor to recover the money which has been paid by the purchaser to the vendor.”

And again on page 2002:

“Where the parties mutually agree to rescind the contract, there being no express stipulation with reference to the payment or payments already made thereunder, the law will imply a promise on the part of the vendor to refund such payment or payments to the purchaser, and the latter may maintain an action to recover back the same.”

And again on page 2003 and 2004:

“Where a contract for the sale of land is rescinded by the vendor, the purchaser is ordinarily entitled to repayment of the purchase money paid, and may maintain an action against the vendor to recover the same. So where the vendor does some act which amounts to a rescission of the contract, the purchaser may recover back the payments made by him.”

In *Maffet v. Oregon & Cal. R. R. Co.*, 46 Or. 443, 457 (80 Pac. 489, 494), it is said:

“Treating the defendant’s declaration that the contract is canceled, and no longer of any force or effect, as an abandonment, the plaintiff might himself aban-

don, and, the contract having thus come to an end, he might very well, as he has done, sue at law to recover what he has paid: *Glock v. Howard & W. Colony Co.*, 123 Cal. 1, 10 (55 Pac. 713, 719, 69 Am. St. Rep. 17, 43 L. R. A. 199). Mr. Justice HENSHAW, in further consideration of this case, says: 'There have been many cases before this court involving the rights of parties to agreements for the sale and purchase of real estate, in which it has been held that, after the parties have rescinded the agreement or mutually agreed to abandon, the vendee may recover the money which he paid in part performance of his contract'; citing cases. This court, however, has settled the principle by the language of Mr. Chief Justice MOORE in *Graham v. Merchant*, 43 Or. 294, 304 (72 Pac. 1088, 1090), as follows: 'When a vendor abandons his contract to convey, the vendee, in his choice of remedies, may elect to rescind the contract, and thereupon maintain an action at law to recover what he has paid thereon as money had and received.' Thus it is that an abandonment by one party may be treated as a proposition to rescind by the other and thereupon he may also abandon, and thus arrive at a mutual agreement to rescind, and the law so treats the correlative acts of the parties."

2. On the other hand, if the purchaser is in default and that default has not been waived by the vendor, and the vendor rightfully and in accordance with law and the terms of the contract, declares a forfeiture of the same, where the contract makes time of the essence of the contract, and provides for a forfeiture of the payment, the purchaser cannot recover back the payment already made, in an action of this kind.

In passing upon the case we shall only consider the rulings and instructions insisted upon as error in appellant's brief.

The thirteenth exception of the defendant is based upon the following instruction asked for by the defendant and refused by the court:

“If the defendant retook the property upon default in payment, under the terms of the written contract, such resumption of possession was not a rescission of the contract *and previous payment therefor cannot be recovered by the plaintiff.*”

We have italicized the last clause of the instruction, because it made plaintiff's right to recover, turn entirely upon the conditions under which the defendant actually retook possession of the property, and entirely ignored the plaintiff's contention that the contract was ended and terminated, by what amounted to a mutual rescission thereof, entirely independent of, and previous to the retaking of possession, some time in the summer or fall of the year 1912.

3. It is obvious, that if the contract was terminated by abandonment on the part of the defendant, acquiesced in by the plaintiff, or by mutual arrangement and consent, in 1912—the fact that defendant afterwards took possession of the property in forfeiture of the contract in February, 1913, would not and could not destroy plaintiff's right of recovery. In other words, the instruction made the case turn absolutely upon defendant's theory of the case and ignored that of the plaintiff.

The court charged the jury:

“A party who has advanced money or done an act in performance of an agreement and then stopped short and refused to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, is not suffered to recover for what has been advanced or done.”

This was as favorable to the defendant in this regard as he could reasonably ask.

The fifteenth exception refers to an instruction asked by the defendant and modified by the court. The defendant asked the court to instruct the jury:

"Before the plaintiff can recover in this action he must show either that he was not in default or that he was ready, willing and able to perform."

The court modified the instruction by adding after the word "default," "or that his default was waived by defendant," and also by adding the word "it" at the end of the instruction.

The addition of the clause "or that his default was waived by defendant" was clearly pertinent to the real issue in the case, and was we think a proper modification.

If the contract was terminated by abandonment on the part of the defendant and mutual rescission in the fall of 1912, as contended by the plaintiff, then there had clearly been a waiver of the default on January 1st of that year, by the acceptance of payment after that time. Indeed, the defendant does not seriously contend that the default on January 1, 1912, was not waived. Under the circumstances the court could not very well give the requested instruction as asked without modification. The addition of the word "it" at the end of the instruction does not, as far as we can see, affect the meaning one way or the other and we do not think the jury could have misunderstood the instruction.

The sixteenth exception refers to the following instruction given by the court:

"If the vendor in a contract for the sale of real estate wrongfully repudiates the contract, and without just cause or reason announces that he will not be bound thereby, and wrongfully insists and maintains that the vendee's interest has been forfeited, this would

amount to a renunciation of the contract by the vendor, and the vendee would thereupon have a right to acquiesce in such renunciation of the contract, and thereby effect a mutual rescission of the agreement.

"In this case, if you find from the evidence that the defendant did, as alleged by the plaintiff in his complaint, repudiate the contract in question while it was still in force, and without reason therefor announce and maintain that the same had been canceled and surrendered, and that he would no longer be bound thereby, such acts would evidence an intent to repudiate the contract on the defendant's part, and the plaintiff would have the right to acquiesce in such repudiation as a mutual rescission of the contract."

4. It is strongly urged on behalf of defendant that there was no evidence to sustain this instruction or upon which it could properly be based. But the defendant himself testified that along some time in the summer or fall of 1912 the plaintiff came to him at his office and delivered up his contract and that he then and there burned the contract. He claims at that time the plaintiff agreed to forfeit the contract. This the plaintiff denies. Defendant testified:

That at this time he considered the contract forfeited; that he "notified the plaintiff at different times to get off the place. The contract was forfeited at that time and I notified him at different times I wanted him to move off of the place."

Defendant testified at another place that he told plaintiff:

"Joe, I see you haven't moved. What is the reason you ain't moving off of the place?"

And still at another place he says:

"I only asked him something about moving off the place and when he was going to get off. * * After I got the place back—that is, I considered having it back—I had the contract that he was living on the place

yet; I sent men out to do some work on the place and try to dig a new well."

The sufficiency of the evidence in this regard will be further considered later in passing upon the motion for nonsuit.

The seventeenth exception refers to the following instruction given by the court:

"Under a contract for the sale of lands rescinded by mutual consent, the rights of the parties under such contract are extinguished. The seller acquires the equitable interest formerly owned by the purchaser, but he cannot, after the rescission, maintain an action for the purchase price. The purchaser is entitled to a return of the purchase money. The seller is ordinarily entitled to a fair rental value for the use and occupation of the lands, less the value of permanent improvements placed thereon by the purchaser, and disbursements for taxes, if any. The value of the improvements is to be estimated by the extent to which they have enhanced the value of the land.

"In this case if you find that in fact the contract in question was terminated by the parties by acts or conduct amounting to a mutual rescission of the same, as defined in these instructions, then the plaintiff would be entitled to recover a sum equal to the value of the property transferred by him to the defendant and money paid by him to the defendant, less a fair rental value for the use and occupation of the land during the time it was in the possession of the plaintiff, and less the payment of two hundred dollars made by defendant to plaintiff, with interest on the same, derived in this way, from the date of the rescission, if a rescission has been proven."

The foregoing instruction seems to authorize the jury to allow the plaintiff interest on the payment made by him for the transfer of the Marion County land, from the date of the rescission, to the date of the trial. This seems to have been error.

5. The law seems now to be well settled in this state that upon a claim of this kind no interest can be allowed: *Sargent v. American Bank & Trust Co.*, 80 Or. 16 (154 Pac. 759, 156 Pac. 431). The case of *Graham v. Merchant*, 43 Or. 294 (72 Pac. 1088), relied upon by the plaintiff, was decided before the *Sargent* case and is practically overruled by that case and the case of *Holz v. Olds*, 84 Or. 567 (164 Pac. 583, 1184).

This error seems to have been prejudicial to the defendant, for the jury clearly must have understood that they could allow interest on the price of the Marion County land, and they evidently did allow some sum as such interest.

This instruction also authorized the jury to allow the plaintiff the small interest payments which he had made on the contract and which were not mentioned in plaintiff's complaint.

The instruction referred to in the eighteenth exception seems to have been fully covered in what we have already said and we think there was no error of the court below in giving the same.

The instruction covered by the nineteenth exception was in reference to the effect of the forcible entry and detainer proceeding in the Justice's Court upon the rights of the parties, and virtually told the jury that that proceeding was in no way decisive of the right of the plaintiff to recover back the money he had paid on the transaction. We think there was no error in these instructions.

The twentieth exception refers to the following instruction given by the court:

"The contract in question in this case provides that upon the default of the purchaser, the seller shall have a right to declare a forfeiture of the contract. If the seller under such a contract wrongfully attempts such

forfeiture when in fact no ground therefor exists, such attempted forfeiture would amount to a breach of the contract upon the part of the seller, and entitle the purchaser to rescind the contract.

"In this case if you find that in fact such an attempt was made by the defendant to forfeit the contract in question when the plaintiff was not in default, or if, having been in default, such default had been waived, then the plaintiff had a right to treat such attempted forfeiture as a renunciation of the contract, and consider the same rescinded, and recover back the payments made by him."

6. As an abstract proposition of law, we think these instructions were correct. A declaration of forfeiture on the part of the defendant was, in effect, a refusal to proceed any further with the contract or to allow the plaintiff any rights thereunder. The plaintiff then could stand upon his rights and insist upon a continuation of the contract; or he had a right to accept the defendant at his word, and acquiesce in the termination thereof. Such a declaration of forfeiture, if wrongful, was just as much a termination of the contract as if the defendant had said in express words, "I will not be bound any further by this contract. I will not proceed any further under it." If the defendant had done this, either by mistake or advisedly, there can be little question but what the purchaser would have a right to treat the contract as ended.

7. It is urged this instruction left it to the jury to determine whether there was a default on January 1, 1913, but we cannot follow this conclusion. The court did not say a word about the default on January 1, 1913, and if the contract was then still in existence and unbreached by the defendant, there was no question but what there was a default, and no one was contending otherwise.

The contention of the plaintiff was that the defendant had breached the contract *before* January 1, 1913, by declaring the contract at an end in 1912. There is some slight evidence offered by the defendant himself, which might have been construed as a waiver of the default in 1913, but we do not think that question is in any way presented by the record.

It is urged, however, the undisputed evidence was, that there was a default in 1912. This is probably technically true. There is no doubt that the interest for that year was not paid, and the court construed the contract as calling for a first payment of interest in January of that year. This construction was probably correct. At any rate it was favorable to the defendant.

8. The instruction does seem to submit to the jury the question whether or not there was a default in 1912, when there was no dispute in the evidence in that regard.

9. But there was evidence tending to show that the default in 1912 had been waived. In fact, we think it was admitted by defendant's own pleadings that it was waived, when he alleged he had accepted payment thereon, after the date of the default. Under the circumstances we cannot see that the defendant was injured by any error of the court in submitting that fact to the jury. The evidence and the pleadings show conclusively that the default in January, 1912, was waived, and that left it as if there was no default at all, in so far as it affects this case. The defendant could not thereafter forfeit the contract for such default without first giving notice and an opportunity to perform.

We think there was no error in the instruction which would justify a reversal in the cause. Neither do we think there was any error in the giving of the charge

alluded to in the twenty-first exception. That charge on the whole was consistent with the principles to which we have already alluded, and was as favorable to the defendant as he could ask.

10, 11. Neither do we think there was any error in the instruction presented by the appellant's twenty-second exception. It is true there was no direct allegation in plaintiff's complaint that the default in 1912 had been waived. That default only appears in the defendant's pleadings. But the defendant in his answer showed affirmatively that he had accepted payment after the date of that default, that is, the payment of \$48 on January 4, 1912, and the payment of \$20 on January 16, 1912. This in itself amounted to a waiver of the previous default in strict payment at the time specified, and cured any possible defect in the pleadings of the plaintiff in that regard.

The plaintiff, over the objection of the defendant, was permitted to testify as to the character and condition of the land which he had purchased from the defendant.

One of the allegations of the complaint, was:

"That the water supply thereon was exhausted and that only a small portion of said farm was in cultivation and the soil thereon was of poor quality and had not been cultivated or sowed to crops for some time previous thereto, the value of the use of said property during said time was negligible and did not equal the value of the improvements and work done, and expenses incurred thereon by the plaintiff during said time, for which the defendant received the benefit, and on account thereof no accounting for the rents and profits from said lands would be necessary to place the defendant *in statu quo*."

12. This allegation was denied by the answer and was directly placed at issue. The evidence was parti-

ment to this allegation and its admission was not prejudicial error.

Plaintiff also was permitted to introduce in evidence a copy of an answer filed by the defendant in a previous action in the Circuit Court for Polk County and the admission of this paper constitutes one of the assignments of error. That answer contained the following affirmative allegations:

"That on or about the 1st day of August, 1912, the plaintiff informed the defendant that he desired to be released from said contract, whereupon the plaintiff and defendant entered into a further agreement whereby it was stipulated that the defendant should release the plaintiff from all further liability and obligation under said contract, and in consideration thereof the plaintiff would surrender up to the defendant his part of said contract in writing, and would surrender possession of said premises forthwith, and that thereafter neither party to said contract should have any claim or demand upon or against the other.

"That thereafter about the first day of October, 1912, the plaintiff surrendered up to defendant his part of said contract in duplicate, and that the same was thereupon in plaintiff's presence destroyed."

13. The answer was no doubt offered as an admission by defendant, to support the allegation in plaintiff's complaint that the contract had been rescinded in the summer and fall of 1912, and not in 1913 as claimed by the defendant. For this purpose it seems to have been proper and we cannot see that its admission was error.

14. One of defendant's assignments of error is that the plaintiff was permitted to testify as to a conversation between him and the defendant about the time of the original transaction, in relation to the recording of the contract between plaintiff and defendant. This testimony was unquestionably very remote, if it had any bearing upon the case at all. The defendant claimed

to have burned the contract and that the plaintiff authorized him to do so. The plaintiff denied this and claimed he never authorized its destruction. We suppose the testimony was offered as tending to show that defendant was not acting fairly in the matter from the first, and that his purpose in burning plaintiff's copy of the contract, was to deprive plaintiff of any evidence, in any claim he might make for the recovery of the money. At any rate the conversation was between the parties hereto and was in reference to the transaction, and we cannot see that defendant was in any way prejudiced by its admission.

A question is raised in the case as to alleged misconduct on the part of attorney for the plaintiff in the course of the trial. There was a colloquy between the attorney and the defendant, while he was on the witness-stand being cross-examined, in relation to the fight between himself and the plaintiff in February, 1913.

"Q. As a matter of fact, in addition to what you said about his intoxication, he wasn't in a very good condition to converse with you at the time, was he?

"A. No, but then what are you going to do if a man jumps on you and—

"Q. (Interrupting.) You know better than that don't you?

"A. Yes, better than to let a man pull a gun on me. When he got to that point I thought I had to do something. I think you would do that."

Thereupon plaintiff's counsel remarked to the defendant:

"I wouldn't do what the jury of Polk County said you did."

It is also claimed the attorney for the plaintiff improperly insisted upon asking repeated questions in the examination of the plaintiff while on the witness-stand

in rebuttal, after the questions had been practically excluded by the ruling of the court. We do not think, however, there was any error in relation to these matters that would justify a reversal. There seems to have been no ruling of the court adverse to the defendant upon any of them, and we do not think there is any sufficient evidence of willful misconduct on the part of the attorney for plaintiff which would justify disturbing the verdict.

In the wordy controversy, which seems to have arisen while defendant was on the witness-stand, between him and the cross-examining attorney, both said things which had no place in an orderly cross-examination, but what was said by the attorney for plaintiff was in some sense invited. As to the questions which were repeated in different forms, the attorney had a right to fully make his record for an appeal, and we cannot say that he transcended the bounds of good faith.

The defendant moved the court for a nonsuit at the close of plaintiff's case, and also for a directed verdict before the case was finally submitted. Both of these motions were denied by the court below and they may well be considered together. They present a very serious and close question, which has been very ably argued and presented upon both sides.

The correctness of the ruling of the court below depends upon whether or not there was any evidence in the case to support the contention of the plaintiff, that the defendant had terminated the contract and announced that he would not proceed further in 1912, prior to the default of the plaintiff in January, 1913.

There was ample evidence tending to show that the default in the payment of interest on January 1, 1912, was waived by the defendant, and if there was testimony to go to the jury, tending to show that the con-

tract was mutually rescinded during the year 1912, or that the defendant wrongfully declared a forfeiture during that year, and before the default of January, 1913, the case was properly submitted to the jury. There is some slight evidence tending to show a waiver of the default on January 1, 1913, but for the purposes of these motions we shall assume, that if the defendant had not breached or agreed to a rescission of the contract, prior to that time, then the motion of the defendant for a nonsuit should have been allowed. On the contrary, it seems settled that if there was a mutual rescission during the year 1912, without any agreement as to forfeiture, or if the defendant during that year wrongfully and without sufficient notice declared a forfeiture and termination of the contract, then the plaintiff could recover.

If the defendant had stood upon his motion for a nonsuit and introduced no evidence in his own behalf, the evidence on the part of plaintiff alone would seem insufficient to have justified a recovery upon his theory of the case. However, the defendant did not rest but introduced testimony in his own behalf, and in the course of that evidence seems to have materially strengthened the case of the plaintiff upon this crucial point.

15. It is well settled in this state that where the defendant has not rested upon a motion for a nonsuit, but has introduced testimony in his own behalf, that evidence can be considered to sustain a recovery on the part of the plaintiff, and that this court will not reverse the ruling of the court below denying a nonsuit, if upon the whole case, as presented both by the plaintiff and the defendant, there was sufficient evidence to go to the jury: *Vanyi v. Portland Flouring Mills Co.*, 63 Or. 520 (128 Pac. 830); *Caraduc v. Schanen-Blair Co.*, 66

Or. 310 (133 Pac. 636); *Oberstock v. United Rys. Co.*, 68 Or. 197 (137 Pac 195); *Weygandt v. Bartle*, 88 Or. 310 (171 Pac. 587).

The testimony of the defendant relied upon by the plaintiff is as follows:

"A. Why, he never come in there about October or ever did and talked to me about Leonard; he come in about that time and delivered up his conratet. * * Well, along after harvest,—along after hop picking, he come into my office and give me the contract, and told me he guessed he would have to throw the place up,—that he couldn't meet the payments, and told me he had rented a place in Marion County, and was going to move off the place and move into Marion County.

"Q. Now, what if anything, was said there in reference to returning or repaying to Cornely any amount paid on the contract or any consideration for his property in Marion County?

"A. Nothing said about that, nothing. * *

"Q. Not what you think or thought, but what the agreement was in reference to terminating this contract at that time?

"A. Nothing was said about that whatever; he simply forfeited the contract at that time. * *

"Q. What he said he was to do—

"A. He said he would forfeit the contract.

"Q. That was his statement?

"A. Yes."

This was in direct examination, and upon cross-examination he testified further:

"Q. Now, you say that along in August, 1912, Cornely came to your office in Dallas and made arrangements to stay until after harvest, and surrender his contract if he couldn't make his payments; is that correct?

"A. It was along toward harvest sometime, must have been along about July sometime; I know it was before harvest.

"Q. Then you say along about the first of October he came in and surrendered up his contract and said he would get off?

"A. Yes, along in the fall; I know it was after hop picking.

"Q. What did you do with his contract?

"A. I put it in the stove right there in his presence. * *

"Q. And what was said, now, between you and Cornely at that time?

"A. Mr. Cornely came in and couldn't meet the contract, and told me he would do as he agreed; he agreed to forfeit it if he couldn't make the payments, and he said he couldn't do it, and I said, very well, and I held the contract, and I says, 'Well, Joe, I guess this is all over with and forfeited; just as well stick it in the stove and end the whole matter'; and he said as far as he was concerned it was all right, and I walked back and slid back one lid and slipped her in the stove; that was all satisfactory with him; he didn't say anything to the contrary.

"Q. That wasn't all was said, was it?

"A. As far as anything I know; I can't remember any other conversation in regard to the contract. * *

"Q. Then you say that notwithstanding that fact thereafter you were ready, able and willing to go ahead with the contract just the same?

"A. Why, if he had come in in a few days and paid the money, I would been tickled to death to get it,—to take the money and let him had the ranch; I didn't want the ranch, I wanted the money.

"Q. You said on direct examination you were at all times, ready, able and willing to go ahead with the contract at the time you declared this forfeiture?

"A. Yes, sir. I was.

"Q. When did you declare that forfeiture?

"A. When he give me that contract.

"Q. Then and there?

"A. Forfeited right then and there.

"Q. What did you say about that,—that is, I am not trying to get all your language, but the substance?

"A. The contract was forfeited; I told him it was and all ended; I didn't suppose anything would be thought about it and throwed it in the stove.

"Q. That is the forfeiture you have been talking about all the time?

"A. Yes, it was forfeited then, the contract was.

"Q. That is the only forfeiture you ever declared?

"A. Well, it was forfeited at that time; I notified him different times to get off the place; the contract was forfeited at that time, and I notified him different times I wanted him to move off the place, and he told me he was going to as soon as he could rent a place, and he rented a place.

"Q. You said for a reasonable time thereafter you were willing he should come in and pay up; now how long a time afterward?

"A. Well, I don't know; I wanted the money for the place; he could come along any time within a month or two and could have paid me the money and I would have sold to him or anyone else for that same amount; his money was as good as any ones; I would have sold to anyone else on the same kind of a contract if they had paid what was back * * But the contract was forfeited right at that time.

"Q. You told him it was forfeited?

"A. Yes, and he was perfectly satisfied to forfeit it.

"Q. Did he say the word 'forfeit'?

"A. Yes; I told him I would expect him at that time, when he was in before harvest,—that I would expect him to come in in the fall and forfeit the contract if he could not pay, but in the fall he come and give me the contract and says, 'Henry, I will have to forfeit the contract; I can't meet the payments,' and he would forfeit the contract and move off the place, and he did rent a place in Marion County, and his intention at that time was good,—he intended to move off the place.

"Q. Is that your idea?

"A. Yes, that is my idea.

"Q. You have never recognized that contract from that time on, then?

"A. No, no.

"Q. This testimony you gave here pursuant to counsel's questions, in reference to a conversation that took place about the first of January, 1913, was clearly not in recognition of the contract then, according to your theory?

"A. I didn't consider he had any right on the place after that time.

"Q. On this surrender of the contract, then, as you now want to describe it, was a clear forfeiture of the contract within the terms of the contract, I presume?

"A. Yes, sir, according to my idea.

"Q. And that was the transaction and all the transaction as you describe it?

"A. At that time, yes, sir.

"Q. But it was never modified at any other time, was it?

"A. No, it was not. * *

"Q. That was a long time after this October instance you referred to where you say the contract was forfeited?

"A. I told him if he could find anyone to actually buy that place and pay me everything that was back I would give him a new contract.

"Q. The same kind of a contract he had before?

"A. One similar, yes, but this contract was all forfeited; it would have to be a different deal and transaction, altogether.

"Q. You explained that to him?

"A. Yes, sir.

"Q. Did you tell him on what terms you would make that deal if he could get a purchaser?

"A. He didn't have any.

"Q. You knew as a matter of fact he was trying to get one, didn't you?

"A. He was still living out there.

"Q. You knew he was trying to sell it?

"A. I was trying—

"Q. (Interrupting.) You were trying to sell it for him?

"A. No, for myself.

"Q. Up to the time he forfeited the contract—thereafter all your efforts were in your own behalf?

"A. They were.

"Q. Then, as I understand it, up to the time he came in your office and delivered his copy of the contract to you,—up to that time you hadn't only known he had been trying to sell it, but you were trying to sell it for him,—his interest in it?

"A. Up to the time he delivered up his contract.

"Q. But thereafter you promised him that if he could make a deal you would still make another contract and recognize his interest?

"A. I told him I would give the other man a contract."

The plaintiff was called in rebuttal and denied that there was any talk about forfeiture of the contract at the time the contract was burned.

16. Of course the jury had a right to believe either of the witnesses or to believe part of the testimony of each one of the witnesses, and disbelieve the remainder of their testimony if they thought it was unreasonable or if there was a conflict between it and other direct testimony.

17. We think, on the whole, this testimony, with the denial of the plaintiff that there was any talk of forfeiture, was sufficient to carry the case to the jury as to whether there was a mutual rescission (without any agreement of forfeiture), and as to whether there was a wrongful forfeiture by the defendant during the year 1912, afterwards acquiesced in by plaintiff.

It is true the plaintiff remained in possession until 1913, but that was not necessarily inconsistent with a termination of the contract. According to defendant's own testimony he had announced that the contract was ended and the plaintiff had tacitly agreed. He also claims that at different times in the year 1912 he talked to the plaintiff about moving off and the plaintiff, impliedly at least, agreed to do so. He also testified he considered that, after October, 1912, the plaintiff had

no absolute right to the property, and that the plaintiff was remaining there trying to sell the property with the understanding upon his part that if he succeeded in making a sale he would only receive a commission on the sale.

Under these conditions we think the court below could not have said, as a matter of law, that there was no evidence to support plaintiff's theory, and therefore, there was no error in submitting the question to the jury.

On account of the errors in the matter of the seventeenth exception hereinbefore referred to, and the fact that the jury under that instruction allowed the plaintiff \$150 interest, which was carried into the judgment, it will be necessary that this cause be reversed and sent back for a new trial, unless we can eliminate the objectionable portion of the verdict and judgment, under the constitutional amendment of 1910, which provides:

"If, in any respect, the judgment appealed from should be changed and the Supreme Court shall be of opinion that it can determine what judgment should have been entered, in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases."

In this case the verdict of the jury was as follows:

"We, the jury in the above-entitled civil action, find for the plaintiff in the sum of \$3,500, and \$150 interest."

18. The jury having specified the amount allowed for interest, it seems we can correct that portion of the error by reducing the amount found by the jury for interest and deducting \$150 from the judgment.

But it is also possible that the jury included in the verdict for the \$3,500, \$145.30 which had been paid by

the plaintiff at different times as interest on the contract and which the court clearly instructed them to allow. It is true the amount of the verdict was even \$3,500—the exact amount at which the Marion County land was put in on the trade. But there was evidence *pro* and *con* as to the value of these lands, and the different estimates of the value ranged all the way from \$2,500 to \$3,500. It is impossible for us to say whether or not the jury allowed these payments. If they did they were misled in that far by the instruction of the court, as these payments were in no way at issue in the cause, and there is no allusion to them whatever in plaintiff's complaint.

It would avoid any possibility of injury to the defendant by the erroneous instruction, if the judgment was reduced as of the time of its entry by the \$150 allowed as interest, and by the sum of \$145.30 which might have been allowed by the jury, under the instruction of the court, for payment not within the issues made by the pleadings. But we cannot say that this would be justice to the plaintiff in the cause, for the reason that it may be the jury did not allow anything for these payments. It is evident the jury did not allow the defendant any credit for the \$200, paid over at the time of the original transaction, and they should not have allowed him anything for that, because that was outside of the Polk County land transaction altogether. In other words, the Marion County land was valued at \$3,700, over and above \$1,500 encumbrance. Of this \$3,700 the defendant paid the plaintiff \$200 in cash, and the other \$3,500 only went in on the Polk County land, so that defendant was not entitled to any credit for that \$200.

Upon the whole we are of the opinion that it will be just if the plaintiff is given the option to remit the

\$150 interest and \$145.30, which may have been included in the verdict on account of payment on interest, and accept a judgment of \$3,354.70 as of the time of the date of the judgment in the court below, or to take a new trial of the entire cause. This we may do under the constitutional provision and the authority of *Hoag v. Washington-Oregon Corp.*, 75 Or. 588 (144 Pac. 574, 147 Pac. 756).

If the plaintiff shall accept such reduction within ten days from the handing down of this opinion then the judgment will be so modified; otherwise, the cause will be remanded for a new trial.

In either event the appellant will recover his costs and disbursements on this appeal. **MODIFIED.**

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Denied March 2, 1920.

PETITION FOR REHEARING.

(187 Pac. 1103.)

On petition for rehearing.

DENIED.

Mr. Oscar Hayter and Mr. Arthur L. Veazie, for the petition.

Mr. Walter C. Winslow and Messrs. Smith & Shields, contra.

Department 2.

BENNETT, J.—Upon the original hearing we tried to give every one of the many specifications of error careful consideration. The appellant, however, has

filed a petition for a rehearing, accompanied by a very able and ingenious brief, in which it is again strongly urged that a mutual rescission in 1912 was not pleaded or relied upon by the plaintiff, and that there was no sufficient evidence of such rescission, or that a forfeiture during that year was declared by the defendant or accepted by the plaintiff.

19. The allegations of the complaint are not entirely clear or definite, it is true; but there was no motion to make more definite and certain, and the parties went to trial as the pleadings stood. We find in the complaint the following allegations:

“That thereafter the defendant decided to abandon and repudiate said contract and to deprive the plaintiff of his interest thereunder, and in pursuance thereof, did, *during the latter part of the year 1912*, repudiate said contract, and, without reason therefor, announced that the same had been canceled and surrendered *and that he would no longer be bound thereby*, * * and any further attempt or offer of performance of said contract upon plaintiff’s part was waived by the defendant and would have been a vain and useless act. That on account of the defendant’s course of conduct and position as hereinbefore alleged the plaintiff has elected to rescind said contract and *to accept the defendant’s repudiation thereof as a mutual rescission and cancellation of said contract.*”

It is urged argumentatively that other portions of the pleading indicate that this acceptance must have been at a later date than 1912, but this is not alleged, and in the absence of a motion to make more definite and certain, we think the allegations (if supported by the evidence) were sufficient to sustain a finding that a forfeiture was wrongfully declared by the defendant and accepted by the plaintiff during the year 1912. It is true the plaintiff does not claim in his complaint

to have given up the possession of the property until February, 1913; but it does not necessarily follow that the contract had not been canceled before that date.

20. This brings us again to the consideration of whether or not the evidence could support such a finding; for, if it could, upon any reasonable hypothesis, such a finding upon the part of the jury must be assumed, in order to support its verdict, under the well-settled rules of law as to the verdict of a jury.

21. The very able brief on rehearing has not satisfied us that the evidence of the defendant himself, was not sufficient to sustain a verdict against him, both as to the forfeiture of the contract by him in 1912, and as to the acceptance of the same by plaintiff. It will be remembered that the defendant testified on direct examination that in October, 1912, plaintiff came into his office and gave him the contract, and he put it in the stove, and on cross-examination he testified:

"Q. When did you declare that forfeiture?

"A. *When he gave me that contract.*

"Q. Then and there?

"A. *Forfeited right then and there * * The contract was forfeited. I told him it was and all ended. I didn't suppose any thing would be thought about it and throwed it in the stove. * * I notified him at different times I wanted him to move off the place and he told me he was going to as soon as he could rent a place."*

It seems plain that this was some evidence that the defendant declared the contract forfeited at this time and refused to proceed further, and that the plaintiff assented to that refusal. It is true the defendant also testified in this connection, that plaintiff at the same time agreed to a forfeiture of his payments. The plaintiff, when called in rebuttal, specifically denied that he

had agreed to a forfeiture, but made no direct denial that the defendant had declared the contract ended. As was said in the original opinion,

“The jury had a right to believe either of the witnesses or to believe part of the testimony of each one of the witnesses and disbelieve the remainder of their testimony, if they thought it was unreasonable.”

This principle seems so well settled that it can hardly admit of doubt.

It is urged that it is improbable that the defendant would have agreed to a termination of the contract, without an understanding of forfeiture; but this is an argument which would go to the jury, rather than the court. However much we might be impressed with the reasoning of the learned attorneys for the defendant, in that regard, we could not make it a reason for interfering with the finding of the jury. It will be noticed that the defendant in the first instance did not say that there was any talk of forfeiture.

“Q. Now what, if anything, was said there in reference to returning or repaying to Cornely any amount paid on the contract or any consideration for his property in Marion County?

“A. *Nothing said about that—nothing.*”

Then, when pressed further by his counsel, he persisted that there was nothing said, but stated his conclusion, that the contract was forfeited.

“Q. Not what you think or thought but what the agreement was in reference to terminating the contract at that time.

“A. *Nothing was said about that whatever.* He simply forfeited the contract at that time.”

And when he was admonished by the court that he could not state a conclusion, and was still further pressed by his attorney, he testified:

“He *said* he would forfeit the contract.”

Under such conditions it is far from our province to say whether all, or any, or what part of his evidence should have been credited by the jury. It is possible that the jury may have been influenced in the case by a supposed injustice, if the defendant was permitted to take back all he had transferred, and at the same time retain the farm he had received from the plaintiff; but we cannot assume that this was so, and in the absence of some showing of bias or prejudice, we are bound to accept its finding as long as there is any evidence to support it, without regard to whether or not we would have reached the same conclusion.

22. It is urged in the brief for rehearing that the opinion does not follow the contention outlined in the brief for respondent. As we read the brief of respondent, he contends for an alternative position. One of the paragraphs of the statement in the brief is as follows:

“The contract being still in force, Campbell wrongfully renounced all liability under it, claiming that it had been canceled by mutual consent in 1912, and on account of his repudiation of the contract, Cornely elected to rescind the same thereby rendering the rescission mutual.”

At any rate, it can make no difference, for we are governed by fixed principles of law, and not by the mere contentions of the parties.

23. It is urged that the repudiation of the contract by the defendant, to work a rescission, must be absolute, and that it cannot in any view of the evidence be so construed in this case. But we think it is sufficient if the words or conduct of the defendant indicated an intention to be no longer bound.

In 13 C. J., page 615, it is said:

“In determining whether there has been a repudiation of a contract by one of the parties, so as to warrant the other in rescinding, the test is whether the *acts and conduct* of the party evince an intention to no longer be bound.”

In *McAllister v. Matthews*, 167 Ala. 364 (52 South. 417, 140 Am. St. Rep. 43), it is said:

“One party may so wrongfully repudiate the contract as to authorize the other to renounce it and refuse to be longer bound thereby. This happens when the acts and conduct of one of the parties evinces an intention to no longer be bound by the contract.”

The testimony of defendant that he declared the contract “all ended,” and that he burned it up, and afterwards insisted upon the plaintiff removing from the premises, was entirely sufficient to carry the case to the jury in this regard.

The rehearing is denied.

MODIFIED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued December 4, 1919, reversed and dismissed January 20, rehearing denied March 2, 1920.

GARDNER v. PORTLAND.

(187 Pac. 306.)

Municipal Corporations—Decree Enjoining Collection of Assessment for Street Improvement Does not Bar Reassessment.

1. A decree invalidating assessment for street paving because the city could not levy an assessment until work was completed does not bar the city from levying and collecting an assessment after completion of the improvement, for otherwise the provisions of Charter of Portland 1903, Section 400, retained as an ordinance under the present Initiative Charter, Section 234, and relating to reassessments where assessments are held invalid, would be meaningless.

Municipal Corporations—Allegation by Single Owner That Improvement Would have Been Defeated by Remonstrances Insufficient Since It Requires Owners of 60 Per Cent of Affected Property Therefor.

2. Where a city declared its intention to pave a street at grade, and so made the improvement, except that a viaduct was built over railroad tracks by railroads and street pavement made thereon, an allegation by single owner that the improvement was abandoned and would not have been consented to, but would have been defeated by remonstrances, is ineffectual, since under Charter of Portland, Section 284, the owners of 60 per cent of the affected property are required to defeat an improvement.

Pleading—Hypothetical Allegations Do not Present Issuable, Material Fact.

3. The allegation in a complaint of what would or would not have been done is hypothetical, and does not constitute issuable fact, and is immaterial.

Equity—Property Owner Failing to Object to Making and Accepting of Street Paving Improvement on Other Than Original Plan cannot Object to Assessment Therefor.

4. In a suit to cancel city street paving assessments, where the city secured a better and safer improvement at less cost than under the established grade plan on which it had declared its intention to improve, and plaintiff by failing to object lured the city to make and accept the improvement, he does not come into equity with clean hands.

Municipal Corporations—City's Right to Assess Benefited Property for Street Paving not Lost Where It in Good Faith Altered Grade.

5. Where a city declared its intention to pave a street at its established grade and in good faith permitted railroad companies to build a viaduct on street over their tracks at their expense for safer crossings, thus changing part of street grade, to which property owners did not object, the city, particularly in view of Charter of Portland, Section 265, is entitled to make and collect a fair assessment therefor from the benefited property where the alteration of the grade imposed no additional servitude.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

This is a suit in equity by which the plaintiff seeks a cancellation of an assessment levied upon his property to aid in payment of the expense of improving Holgate Street in the City of Portland by paving the same. It is the same improvement mentioned in *Ukase Investment Co. v. City of Portland*, ante, p. 176, (186 Pac. 558), in which an opinion has this day been

rendered. The two causes differ only in the fact that the other case was a writ of review and this is a suit in equity. The facts are the same in both cases. Suffice it to say in this case the plaintiff seeks to defeat the assessment, among other things, on the ground that the city made a substantial departure from the original plan, amounting, as the plaintiff contends, to an abandonment of the same, with the result, as he claims, that it has lost jurisdiction to assess for the work in its present form. It appears that the city declared its intention to improve Holgate Street by paving it on the then established grade. The thoroughfare runs east and west in the city and crosses the railroad tracks, ten in number, of the Southern Pacific Company and the Oregon-California Railroad Company. After due proceedings a contract was let for making the improvement on the old grade. As the work progressed it became apparent that it would be advantageous to the public that the city grade be raised on six blocks covering the railroad tracks, so that the crossing would be overhead instead of at railroad grade. Without objection being interposed, although regular notice thereof was given, the city passed an ordinance raising the grade sufficiently to accomplish that purpose. In addition to that, after the contractor had finished other portions of the pavement according to the original design, work was suspended until arrangements were made whereby the railroad companies at their own expense built a viaduct of steel and concrete construction on the new grade. Pending this, the city undertook to levy an assessment to pay for the already completed portion of the pavement. This was defeated by a suit which was decided in favor of this plaintiff against the city, wherein it was held in substance that an important part of the pavement cover-

ing the six blocks already mentioned had been omitted and until the work was completed the city had no right to levy an assessment. The plaintiff contends that this decree is a final adjudication ousting the city of all power ever thereafter to assess for that improvement, and urges this as one ground for his present suit. This, however, was before the viaduct had been completed. After it was finished the original contractor, after making proper reduction of the price, laid the pavement over the viaduct, the final result being that the pavement is uniform, so far as texture and utility are concerned, throughout the whole district, the only material exception being that over the six blocks mentioned it is laid on the new grade.

The city engineer at this point made his certificate to the council to the effect that the work had been completed substantially according to the original design. The council gave notice of the filing of the certificate and thereby required property owners who were opposed to the acceptance of the improvement thus made, to file their objections. None were filed, and without objection in any form the council accepted the improvement. It then directed the proper officer to prepare a preliminary assessment on the property in the district, to cover the net cost of the improvement. Notice was given that opportunity would be offered at a certain date to file objections to the adoption of the assessment. Interested parties did file objections. It is not alleged in the complaint that the plaintiff filed any; neither do any objections by him appear in evidence. Those filed, however, were referred to the commissioner on public works, who, with the aid of the city attorney, examined the matter and made findings of fact and conclusions of law overruling all the objections. The findings and conclusions were reported to

the council and a date was set for their consideration. No one appeared in support of the objections and the council adopted the findings of fact and conclusions of law thus reported, and overruled all the objections to the assessment. It afterwards passed an ordinance levying the assessment as reported. Then followed this suit to enjoin its collection. The Circuit Court sustained the objection and canceled the assessment. The city appealed. **REVERSED AND DISMISSED.**

For appellants there was a brief over the names of *Mr. L. E. Latourette*, Deputy City Attorney, and *Mr. Walter P. La Roche*, City Attorney, with an oral argument by *Mr. Latourette*.

For respondent there was a brief and an oral argument by *Mr. W. Y. Masters*.

BURNETT, J.—1. Section 400 of the Charter of Portland, approved January 23, 1903, retained as an ordinance under Section 284 of the Initiative Charter of the city revised August 19, 1914, reads in part as follows:

“Whenever an assessment for the opening, altering, or grading of any street, or construction, reconstruction, or repair of any sewer, or for any local improvement which has been or may hereafter be made by the city, has been or shall hereafter be set aside, annulled, declared or rendered void, or its enforcement refused by any court of this state, or any federal court having jurisdiction therein, whether directly or by virtue of any decision of such court, or when the council shall be in doubt as to the validity of such assessment, or any part thereof, the council may, by ordinance, make a new assessment or reassessment upon the lots, blocks, or parcels of land which have been benefited by such improvement to the respective and proportionate shares

of the full value thereof. Such reassessment shall be based upon the special and peculiar benefit of such improvement to the respective parcels of land assessed, at the time of its original making, but shall not exceed the amount of such original assessment. * * Such reassessment shall be made in an equitable manner, as nearly as may be in accordance with the law in force at the time it is made; but the council may adopt a different plan of apportionment of benefits when, in its judgment, essential to secure an equitable assessment. The proceedings required by this charter to be had prior to the making of the original assessment shall not be required to be taken or had within the intent of this section. Such reassessment shall be made and shall become a charge upon the property upon which the same is laid, notwithstanding the omission, failure, or neglect of any officer, body, or person to comply with the provisions of this charter connected with or relating to such improvement and assessment, and notwithstanding the proceedings of the council, executive board, board of public works, or any officer, contractor, or other person connected with such work, may have been irregular or defective, whether such irregularity be jurisdictional or otherwise * * .”

Section 265 of the present Charter of the City of Portland reads:

“The council shall have the right, power and authority to determine whether any railroad crossing of any street or highway within the corporate limits of the City of Portland is dangerous, and to provide for the elimination of any grade crossing of any railroad on such street or highway, whenever, in the opinion of the council, it is necessary to eliminate the same.”

The contention of the plaintiff that the former decision of the Circuit Court enjoining the collection of the assessment there involved bars the present suit cannot be sustained. All that decree pretended to determine was the validity of that particular assessment. It is

manifest that no further steps can be taken by the city to collect the assessment there involved. But that impost is not here in question. What we are called upon to determine is whether the new assessment is valid. An improvement has been actually made. It exists. It has been determined by the council in regular proceedings that it is beneficial to the property assessed. As said by Mr. Justice WOLVERTON in *Duniway v. Portland*, 47 Or. 103, 110 (81 Pac. 945):

“The remedy is not for a collection of the old assessment, as was that afforded by Section 156 of the old charter, but for a reassessment of benefits derived from the failed improvement, not failed because not made, but failed because of an irregularity in the procedure for impressing the lien for the costs of the benefits, and a collection of such reassessment.” (Citing authorities.)

The reassessment system devised by Section 400 would be empty and meaningless if the former decree described in the complaint should be construed absolutely to bar for all time any effort of the city to collect by assessment the expense of a really completed and useful betterment.

2, 3. It is said in substance in the complaint that the improvement was abandoned and that it “would not have been consented to by the property owners adjacent to said street and whose property was to be assessed to pay for said improvement, but sufficient remonstrance would have been made against said improvement as attempted to be made by said city, to defeat the same, under the provisions of the city charter.” What would or would not have been done does not constitute issuable fact and is immaterial to the present inquiry: *Churchill v. Meade*, 92 Or. 626 (182 Pac. 368). Moreover, the present Charter in Section

284 thereof reserves the right only to "the owners of 60 per centum in extent of the property affected by any assessment for a local improvement except for street opening or sewers to defeat the same by remonstrance." The allegation noted is also ineffectual for the reason that the plaintiff does not pretend to represent 60 per centum in extent of the property involved.

4, 5. The whole subject of reassessment under charters such as we have before us, is exhaustively treated in the opinion of Mr. Justice McCAMANT in *Wagoner v. La Grande*, 89 Or. 192 (172 Pac. 305). The record does not show that the whole amount of the assessment exceeds the amount of the original assessment. On the contrary, by the erection of the viaduct at their own expense by the railroad companies a material saving on the whole assessment was effected. The substance of the situation is that at a less total cost a better and safer improvement has been installed and is in use. Although warned of the matter, the plaintiff made no objection to the acceptance of the improvement as finally established. He does not come into court with clean hands, in that by his failure to object he lured the city on to make the improvement and to accept it in its present form. The equitable principle established by the decisions based on charters and city legislation like that in question is that when the city in good faith, without fraud, installs a really beneficial improvement, it is permissible to collect a fair and valid remuneration from the property benefited thereby. No additional servitude was imposed upon any of the property by the alteration of the grade: *Brand v. Multnomah County*, 38 Or. 79 (60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L. R. A. 389); and in the absence of any showing that the total assessment is greater than

the former already set aside, the plaintiff has not disclosed any injustice from which a court of equity will relieve him.

The decree of the Circuit Court is reversed and one here entered dismissing the suit.

REVERSED AND DISMISSED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued January 15, affirmed March 2, 1920.

BROCKWAY v. READY BUILT HOUSE CO.

(187 Pac. 1038.)

Corporations—Stock Subscription may be Made in Either Property or Services Under Agreement Providing Therefor.

1. Payment for stock subscribed may be made in property or services, if so agreed upon between corporation and subscriber; but, in absence of such agreement, the subscription is deemed payable in cash.

Corporations—Corporation's Debt to Subscriber may, Under Agreement With Corporation, be Credited upon Amount Due upon Unpaid Subscription.

2. As between a solvent corporation and a subscriber who is a creditor of the corporation, the parties may agree that the debt owing to the subscriber may be credited upon the payment due from him upon an unpaid subscription.

Corporations—Subscriber's Unliquidated Claim not to be Set Off in Equity Against Subscription.

3. In absence of agreement or equitable ground of relief, a subscriber having an unliquidated claim against a corporation cannot go into equity and have the claim there liquidated and set off against the amount due on subscription; the corporation having a right to have the validity of the claim tried at law with the aid of a jury.

Corporations—Allowance of Claim of Subscriber and Credit for Amount in Payment of Assessment, Legal.

4. In absence of fraud, corporation may allow claim presented for machines furnished or services rendered by subscriber and credit amount in payment of assessment.

From Multnomah: HARRY H. BELT, Judge.

Department 2.

This was a suit primarily to restrain defendants from selling plaintiff's shares of stock for an alleged unpaid assessment thereon.

The complaint alleges in substance that in May, 1911, plaintiff, defendant J. H. Fenner, and W. R. Misner organized the defendant corporation; that Fenner was elected president, plaintiff secretary and treasurer, and that plaintiff, defendant Fenner, and Misner were elected directors; that the capital stock was twenty thousand (\$20,000) dollars, divided into shares of \$10 each, of which Fenner subscribed for 666⅔ shares, Misner for the same number and plaintiff for a like number, one share being issued to plaintiff in his own name and 665⅔ in the name of his mother, Pamela Janet Brockway, and subsequently assigned to plaintiff; that each of the subscribers paid \$250 into the corporation and that no other cash payments have been made thereon; that it was understood and agreed between plaintiff and said corporation that he would pay the balance due upon said stock by rendering service to said corporation, and that during the year 1913 and up to May, 1914, he rendered service to said corporation of the reasonable value of \$1,000, for which he has received no compensation whatever, except that he was entitled to have the same credited upon the purchase price of his stock; that on May 1, 1914, plaintiff gave up all other employment and devoted his whole time to the service of said corporation for a period of two years and three months, and that said services are reasonably worth the sum of \$300 a month, which amounts in the aggregate to the sum of \$8,100, and that plaintiff was paid thereon in money the sum of \$1,141.52 up to November 1, 1915, and other payments since said

date, amounting to less than \$500, the exact amount of which plaintiff does not know, but which is known to defendant, who fails and refuses to make him a statement of such amount.

The complaint further alleges: That through the efforts of plaintiff he established for the corporation a highly profitable business, but that in 1916 defendant Fenner conceived the idea of either wrecking the company and taking it over by that method, or else by some unlawful method getting from plaintiff his stock in said corporation, and, in order to effectuate the same, entered into a conspiracy with the defendant Patterson, who was a clerical employee of the corporation, and procured the proxy of defendant Knapp so that with his own stock he had a majority of the stock of the corporation, and at the annual election of 1916 he caused the following board of directors to be elected, to wit: J. H. Fenner, A. R. Fenner, E. F. Patterson and O. W. R. Hossack, and defeated plaintiff as one of the directors, and said board of directors elected J. H. Fenner president and general manager; A. R. Fenner, his wife, vice-president; E. F. Patterson treasurer, and O. W. R. Hossack secretary, and thereafter the directors passed a resolution levying an assessment of 15 per cent upon all the stock of the corporation, although they well knew that there was due and owing plaintiff for services performed, as aforesaid, more than enough money to discharge the full purchase price of said stock and that plaintiff owed nothing thereon. That at the time plaintiff was voted out of office, neither Knapp nor Fenner had paid the corporation anything for their stock, except the \$250 paid by each as aforesaid, although Fenner had performed certain services in excess of what had been paid and for which he would have been entitled to credit.

It was also alleged upon information and belief that for the fraudulent purpose of carrying out his plans, defendant Fenner transferred without consideration one share of stock to each of the defendants, Patterson and Hossack, and that they have no financial interest in the corporation, but are merely dummies put in for the purpose of carrying out the plans of Fenner, and that Fenner also transferred certain of his stock to his wife A. R. Fenner, who is also on the board of directors, for the purpose of carrying out the plans of her husband. That at the time said assessment was levied the property of the corporation had increased in value until it was reasonably worth \$8,000, and had an established business and goodwill of the value of \$12,000. That plaintiff has declined to pay said assessment and has demanded an accounting, but that defendants who have possession of all the corporate books refuse to account and have advertised plaintiff's stock for sale and unless restrained will sell the same on said assessment.

There were also allegations that the defendants were conspiring with F. C. Knapp to wreck the corporation and turn over its property, goodwill, and business to the Peninsula Lumber Co., of which Knapp was president, and the usual allegations of irreparable injury.

There was a prayer for a decree that defendants be enjoined from selling plaintiff's stock, adjudging that it had been fully paid for and that defendants be enjoined from attempting to undermine the business of the Ready Built House Company, or disposing of its business to any other company, and for equitable relief generally.

A temporary injunction issued, and thereafter the defendant corporation answered, among other things denying that it was agreed that plaintiff should pay

for his stock by personal service or that he has rendered any services for which he was to be paid, and denied that any services were rendered by plaintiff for which he was paid, or to be paid, any sum whatever and substantially denied every material allegation of the complaint.

There were like denials in answers filed by the other defendants, which are too long to be inserted here, but sufficient in form and substance to put plaintiff upon proof of the allegations of wrongdoing alleged in the complaint.

A reply was filed putting the cause at issue, and upon a hearing the court made formal findings as to the existence and business of the corporation and the relation of the parties thereto; found that the assessment of 15 per cent was duly levied; that plaintiff, aside from his duties as secretary, performed labor and rendered services for defendant corporation at its special instance and request, but that no understanding or agreement was ever made or had by and between the plaintiff and defendants, or either of them, that plaintiff should be credited upon the unpaid portion of stock issued to him for the amount due for such labor and services.

As a conclusion of law the court found that the amount due plaintiff for labor and services was not a proper offset against the amount due defendant corporation, on account of stock subscribed by him, and that therefore plaintiff was not entitled to relief in equity, and thereupon entered a decree dismissing the suit without costs to either party, from which decree plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Jay Bowerman*.

For respondent there was a brief and an oral argument by *Mr. Frank H. Hilton*.

McBRIDE, C. J.—The allegations of a conspiracy among the defendants to wreck the corporation are not sustained by the evidence and need not be further considered.

1. The evidence, in regard to what, if anything, plaintiff was to be paid for his services, is conflicting, and there is no evidence that the defendant corporation in its corporate capacity ever agreed that any amount due or to become due on account of such services should be credited against his subscription for stock. There is no doubt that payment for stock subscribed may be made in property or services, if so agreed upon between the corporation and the subscriber: 1 Cook on Corporations, Chapter II, Sections 16, 17 and 18. But in the absence of such an agreement, the subscription is deemed payable in cash: *Ibid.*, Section 17, *supra*.

2. There is also no doubt but that as between a solvent corporation and a subscriber, who is a creditor of the corporation, the parties may agree that the debt owing to the subscriber may be credited upon the amount due from him upon an unpaid subscription.

3. But this is as far as any of the authorities go. We have found no case, and counsel for plaintiff has cited us to none, going so far as to hold that in the absence of an agreement to that effect, and in the absence of some other equitable ground of relief, a subscriber to stock, having an unliquidated claim against a corporation for services, or otherwise, can go into equity and have the claim there liquidated and set off against the amount due on his subscription. Such a course would deprive the corporation of its right to

have the validity of the claim tried at law with the aid of a jury, to say nothing of the embarrassments which would arise to corporations in making calls for assessments and computing in advance the amount necessary to include in the call.

If an employee stockholder can thus offset a claim for personal services against his corporation, there would be no valid reason why he might not buy up claims of others against the company and invoke the aid of equity to offset them against his subscription.

The case of *Anthony v. Hillsboro Gold Min. Co.*, 58 Or. 258 (113 Pac. 442, 114 Pac. 95), is cited by plaintiff in favor of his contention, and, while at first glance it may so appear, a critical examination of it shows the contrary.

In the first place, there was another invulnerable ground in that case for equitable relief, and the question of the value of Anthony's services was merely incidental to the main question. There was an attempt to sell his shares upon an assessment levied in pursuance of a void by-law, and the legality of the proceedings was the principal matter contested. Equity having jurisdiction for this purpose could finally settle all matters relating to the subscription which were in dispute between the parties.

In the second place, the court found that there was an agreement between the parties that the plaintiff Anthony should put his service against the money which the other parties to the adventure should expend in paying for the mine, and that, as the other parties had received shares of stock to the amount of the money they had contributed, Anthony was entitled also to receive stock to the value of the services rendered by him less \$553.50, unlawfully drawn from the company's treasury.

It will be noted that here was an agreement between the parties. Anthony, in effect, was to pay in services irrespective of their value, and against these services the other parties were to pay money. Anthony's services constituted in effect a liquidated demand, and this, coupled with the agreement recited in the opinion, probably brought the case within the rule, as stated in Cook on Corporations, Chapter II, Sections 16, 17 and 18. The writer of this opinion, who tried the case at Circuit, thought and decided differently but was reversed, and no doubt properly, by this court.

It may be proper to add that the phase of the case here discussed was not argued in the briefs of counsel, or alluded to by the court in its opinion in *Anthony v. Hillsboro, etc.*, 58 Or. 258 (113 Pac. 442, 114 Pac. 95), the defendants relying principally upon certain estoppels pleaded in the answer as a defense against the patent irregularity in the notice of sale of the stock.

4. It is claimed that the assessment is unequal, but no inequality is shown in the pleadings, which allege in substance that each subscriber paid the first assessment of 10 per cent on the stock subscribed by him, and that no other payments had been made thereon by anybody, except in so far as the value of the services rendered by plaintiff and Fenner constituted payments. In the testimony it appeared that at the inception of the corporation Fenner had furnished certain necessary machinery, for which he had never been paid. Fenner presented a claim for the price of the machinery, with interest, and this claim was allowed by the corporation, and by agreement he was given credit for the amount in payment of his assessment. In this, in the absence of fraud, there was nothing illegal. There is no doubt or controversy about his having furnished the machinery and nothing to indicate

that his claim for compensation was not just. The corporation had a right to allow it and, when so allowed, to agree that the amount found due him should be credited upon the sum due upon stock subscription.

Had plaintiff presented his claim for services and succeeded in inducing the corporation to allow it or part of it and to credit it upon his stock subscription, the transaction would have been perfectly legal and regular, but his claim has never been liquidated and no agreement to credit it upon his stock subscription has been shown, so that so far as we can see he has no remedy except to pay his subscription and bring his action at law upon his alleged claim for services, so that a jury, which is seldom illiberal when a question of wages is submitted to it, can determine what the actual agreement was in reference thereto and appraise the value of the services performed.

The decree of the Circuit Court is affirmed.

AFFIRMED.

BEAN, JOHNS and BENNETT, JJ., concur.

Argued January 22, affirmed March 2, 1920.

CHANDLER INV. CO. v. MATLOCK INV. CO.*

(187 Pac. 1105.)

Execution—False Representations by Purchaser or Judgment Creditor to Prevent Competition Avoids Sale.

1. As a general rule, false representations made by a purchaser or by a judgment creditor to prevent competition will render a sale void, and if the representation is untrue, it is usually immaterial whether the person making the representation did or did not know of its falsity.

*For authorities passing on the question as to chilling of bids at judicial sale, see note in 42 L. E. A. (N. S.) 1198. **REPORTER**

Execution—Person Having Valid Interest in Property to be Sold may Announce His Interest.

2. If a party has an interest in or a valid claim against property to be sold under execution, he may announce such interest or claim without invalidating sale.

Mortgages—Single Money Decree Could not be Given in Proceedings to Foreclose First and Second Mortgages in Single Proceeding.

3. Conceding that first mortgage given by four persons could be foreclosed in same proceeding with second mortgages given by two of the four, a single money decree could not be given.

Mortgages—Bidding at Sale not Chilled by Statement of One Interested That Bidders of Property of One Defendant Would Take Subject to Second Mortgage.

4. Where M. and L. gave to an investment company a first mortgage on property of each, and thereafter M. gave to company a second mortgage on his property and a bank bought all the interest of L. with knowledge of second mortgage, it was not a valid objection, on ground of chilling bidding, to confirmation of sale on foreclosure of first mortgage that representative of company stated that bidders of property of M. would take "subject" to second mortgage, since, notwithstanding Section 423, L. O. L., failure to make junior encumbrancer a party does not invalidate decree, though foreclosure of first lien does not bar equity of redemption.

From Coos: GEORGE F. SKIPWORTH, Judge.

Department 1.

This is an appeal from an order confirming the sale of real property made pursuant to a decree rendered in a suit to foreclose a mortgage. The Chandler Investment Company and the Flanagan & Bennett Bank are corporations. On April 20, 1915, J. Albert Matson and his wife, and Herbert Lockhart and his wife made and delivered to the Chandler Investment Company their joint and several promissory note for \$22,711.50, payable on or before two years after date to the order of the Chandler Investment Company with interest. Contemporaneously with the execution and delivery of the note Herbert Lockhart and wife deeded to the Chandler Investment Company certain parcels of land which they owned, and at the same time J. Albert Matson and wife conveyed and caused to be

conveyed to the Chandler Investment Company certain parcels of land which they owned. These conveyances, although in form deeds, were in fact mortgages; for under date of April 20, 1915, Matson and wife as first parties, Lockhart and wife as second parties, and the Chandler Investment Company as the third party, entered into an agreement of trust in which it is expressly stated that "the third party by said conveyances holds the titles to said properties only as security in the nature of mortgages, for the payment" of the note and "for the repayment of expenses incurred in the course of holding said titles." This agreement of trust embraces 16 parcels of land, and the parcels are numbered consecutively from 1 to 16, inclusive. When the note was delivered Lockhart and wife owned parcels numbered from 1 to 9 inclusive, and, as we understand the record, the Matsons owned parcels numbered 10 to 16, inclusive. Parcel 2 was subsequently released from the mortgage and hence is eliminated from further consideration.

On July 28, 1916, Matson and wife borrowed \$6,500 from the Chandler Investment Company, and to evidence that indebtedness they gave to the lender their note for that amount payable on or before two years after date with interest, and for the purpose of securing this note the Matsons as the first parties and the Chandler Investment Company as the second party entered into a "supplemental agreement of trust," in which it is agreed that the Chandler Investment Company shall hold the title to the parcels of land, numbered 10 to 16, inclusive, which had previously, on April 20, 1915, been deeded and caused to be deeded by the Matsons to the Chandler Investment Company, and "that this transaction is intended by the parties to be in the nature of a second mortgage on said prop-

erty from the first parties hereto, the first mortgage being evidenced by the above described agreement of trust of April 20, 1915." The note for \$6,500, was, by payments, afterwards reduced to \$3,500.

At some time after July 28, 1916, the Flanagan & Bennett Bank purchased from the Lockharts parcels 1 to 9, inclusive, less parcel 2, subject of course to the mortgage dated April 20, 1915. In other words, the bank acquired all the interest which the Lockharts had in the mortgaged property.

The promissory note made on April 20, 1915, not having been paid, the Chandler Investment Company brought suit to foreclose the note and mortgage. The Matlock Investment Company, a corporation, J. Albert Matson and his wife, Herbert Lockhart and his wife, the Flanagan & Bennett Bank, and certain other persons were named as parties defendant in the suit. Neither the note nor the supplemental trust agreement of July 28, 1916, is referred to in any pleading in the suit, nor is either paper mentioned in the decree. The Flanagan & Bennett Bank answered, and afterwards the Chandler Investment Company and the Flanagan & Bennett Bank entered into a written stipulation by which it was agreed that, "upon the sale of the mortgaged property on execution to enforce the decree which may be entered into in this cause in favor of plaintiff," the mortgaged parcels shall be sold in the following order: 10, 11, 12, 13, 14, 15, 16 and 1, 3, 4, 5, 6, 7, 8, 9. It was further stipulated that the bank "may redeem from said sale of any of the lands in parcels 1, 3, 4, 5, 6, 7, 8 and 9 at any time within one year from the date on which the sale thereof is confirmed by the court, by paying the amount for which the same is sold at said sale," with interest and taxes, less the revenues received from the lands.

The suit in foreclosure terminated on October 18, 1918, in a decree adjudging that the Chandler Investment Company recover from Matson and wife and Lockhart and wife, the makers of the note of April 20, 1915, the sum of \$25,233.44, the amount due on the note, and the further sum of \$4,357.76, on account of moneys paid by the plaintiff for taxes, special assessments, insurance, and the like, together with costs and disbursements, amounting in the aggregate to \$29,949.64.

The decree also provided for a foreclosure of the mortgage, directed that the parcels of mortgaged property be sold in the order agreed upon in the written stipulation, and gave the bank a right to redeem on the terms fixed by the stipulation.

Upon the application of plaintiff a writ of execution was issued. Notice was given that the mortgaged property would be sold on November 30, 1918, and that the fifteen parcels of land would be disposed of in the order fixed by the decree. The sale was held in conformity with the notice. Among those who attended the sale were T. T. Bennett, an attorney of record for the Flanagan & Bennett Bank, and L. A. Liljeqvist, the attorney of record for the plaintiff. At some time after the sheriff had begun proceedings to sell the property, but before any part of any parcel was struck off to the successful bidder, T. T. Bennett in the presence of those who were attending the sale, objected to the sale on the grounds, among others, that the execution was defective and that the notice was defective; and according to the testimony of one witness "Mr. Bennett turned to the bidders and stated they would not get a good title." After T. T. Bennett concluded this statement, L. A. Liljeqvist, as the representative of the Chandler Investment Company, made the following statement to the persons attending the sale:

“The Chandler Investment Company has a mortgage on parcels 10, 11, 12, 13, 14, 15 and 16 due and unpaid, claimed as mortgage lien on this property, in the sum of \$3,500 and interest, on parcels 10 to 16 inclusive, as shown by the supplemental agreement of trust on file in the office of the Coos County Clerk, and the purchaser at the sale of the property of parcels 10 to 16, inclusive will take subject to the mortgage of \$3,500 and interest.”

T. T. Bennett then made an “objection for the reason that Mr. Liljeqvist’s statement is made for the purpose of discouraging people at the sale.” Thereupon L. A. Liljeqvist stated that—

“It is not for the purpose of discouraging people at this sale, but for the purpose of advising the bidders.”

The sheriff proceeded with the sale. The Bennett Trust Company, acting through T. T. Bennett, purchased part of the property for which the company paid \$479.25 in cash; H. A. Wells purchased a portion of the premises for \$847.50 in cash; and the remainder was bid in by the Chandler Investment Company for the aggregate sum of \$28,622.89, which was credited on the execution and decree. The total amount made on the sale was \$29,949.64, or the exact amount of the money decree against the Matsons and Lockharts.

After the sheriff made and filed his return on the writ of execution, the Flanagan & Bennett Bank filed its objections to a confirmation of the sales made by the sheriff under the writ. Among the objections made by the bank was the claim that the statement made by L. A. Liljeqvist, in the presence of the persons attending the sale, about the Chandler Investment Company having a mortgage for \$3,500 on parcels 10 to 16, inclusive, chilled the bidding. The trial court overruled

the objections and confirmed all the sales. The bank appealed from the order of confirmation.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Teal, Minor & Winfree* and *Messrs. Bennett & Swanton*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief and an oral argument by *Mr. L. A. Liljeqvist*.

For defendants there was a brief submitted over the name of *Mr. J. T. Brand*.

HARRIS, J.—Although the note of April 20, 1915, represented a joint and several indebtedness from the four makers to the payee, yet as between the makers themselves, the bank says, the sum of \$6,211.50, or 27.34 per cent of the face of the note, was the debt of the Matsons, while the sum of \$16,500, or 72.66 per cent of the face of the note was the debt of the Lockharts. If as between the makers of the note the Matsons owed 27.34 per cent and the Lockharts owed 72.66 per cent of the aggregate indebtedness on the note, then the Matsons owed \$8,188.23 and the Lockharts \$21,761.41 of the judgment for \$29,949.64 secured by the Chandler Investment Company against them. The bank argues that as between the makers of the note parcels 10 to 16, inclusive, or the Matson lands, were chargeable with \$8,188.23, while parcels 1 and 3 to 9, inclusive, the lands formerly owned by the Lockharts but now owned by the bank, are chargeable with \$21,761.41. At the sale the Matson lands, parcels 10 to 16, inclusive, brought the aggregate sum of \$6,090.50, or \$2,097.73 less than the Matsons' share of the indebtedness, while

the Lockhart parcels were sold for \$23,859.14, or \$2,097.73 more than the Lockharts' share of the indebtedness. The bank contends that the statement made by L. A. Liljeqvist at the sale chilled competition, with the result that the Lockhart lands were compelled to carry a portion of the burden which should have been carried by the Matson lands. In substance, the argument of the bank is that as between the makers of the note the Matson lands were charged with the obligations of a principal as to the Matsons' share of the indebtedness and with the duties of a surety as to the Lockharts' share of the indebtedness. Although each of the four makers of the note was primarily liable to the payee for the whole debt, and none of the makers occupied the position of a surety as between them and the payee, still it may be assumed for the purposes of the discussion that, as between the makers themselves, the Matsons owed only 27.34 per cent of the total indebtedness.

1, 2. As a general rule, false representations made by a purchaser or by a judgment creditor to prevent competition will render a sale void: *Bethel v. Sharp*, 25 Ill. 173 (76 Am. Dec. 790). If the representation is untrue, it is usually immaterial whether the person making the representation did or did not know of its falsity (*Reed v. Diven*, 7 Ind. 189), although illustrations are not lacking of instances where the sale will not be set aside unless it is shown that the representation deterred some person or persons from bidding: *Conley v. Redwine*, 109 Ga. 640 (35 S. E. 92, 77 Am. St. Rep. 398). However, if a party has an interest in or a valid claim against property to be sold under execution, he may announce such interest or claim without invalidating the sale: 17 Cyc. 1257; *Nodine v. Rich-*

mond, 48 Or. 527, 546 (87 Pac. 775); *Leake v. Anderson*, 43 S. C. 448 (21 S. E. 438). See note in 20 L. R. A. 545.

The bank stipulated that it became the owner of the Lockhart parcels after the execution of the note, deeds, and trust agreement dated April 20, 1915. It is not contended by the bank that it purchased without knowledge of the first mortgage, nor does the bank claim that it acquired the interest of the Lockharts without notice of the second mortgage. Whatever interest the Lockharts conveyed to the bank was acquired by the latter subject to both mortgages. Prior to the sale under execution T. T. Bennett, who represented the bank, was made aware of the fact that the Chandler Investment Company claimed that its second mortgage on the Matson parcels was still a lien, although it was junior to the mortgage of April 20, 1915; and, indeed, he expected that L. A. Liljeqvist would make public announcement of that fact at the time and place fixed for the sale under execution, for the record shows that, at the request of Mr. Bennett, Fred Hollister attended this sale for the sole purpose of listening "very attentively to the statements made by Mr. Liljeqvist" and thus be enabled to "testify in the future to what he said." According to the testimony of Fred Hollister there were "probably half a dozen" persons present at the sale. The officer who conducted the sale says that he remembers the names of all the persons "who came and went and stopped and listened to the proceedings that took place" during the sale; and according to his testimony there were present during the sale the officer, a stenographer employed in the sheriff's office, T. T. Bennett, L. A. Liljeqvist, "Henry Wells and Mr. Chandler." Besides Fred Hollister, who was present only a part of the time, Mr. Brand "stayed a

while, but not all of the way through." Laying aside for the moment the statement made by Mr. Liljeqvist, there is no evidence tending to show that any person was deterred from bidding, unless it can be said that Mr. Bennett was such a one. Mr. Bennett testified thus:

"While the Flanagan & Bennett Bank does not believe that Mr. Liljeqvist's claim of \$3,500 is a legitimate one, we do believe that we would have a fight or a lawsuit on our hands if we bought in the Matson property, and to that extent it deterred us from bidding at that sale; deterred me from bidding in the Matson property. * * My object at that sale at that time was to force Mr. Chandler to bid as much as possible for the Matson property; I did not want the property, but I wanted them to bid as high as I could induce them to bid, and I bid against them on every piece of property of Mr. Matsons that was sold, and I took into consideration, and I thought and believed that if I purchased the Matson property I would have to fight Mr. Chandler and Mr. Liljeqvist in another lawsuit in order to set aside this illegal claim of Mr. Chandler's claim of \$3,500 and interest, which they claim is ahead of the sale and which I claim was not. * * I did bid, I am very sure, on every piece of property of Mr. Matsons that was offered; I bid something."

In brief, the purpose of the witness was, not to acquire any of the Matson property, but to induce the Chandler Investment Company to bid as high as it could be induced to bid. Mr. Bennett, who represented the Bennett Trust Company as well as the bank, bid on every piece of Matson property; and it may be noted in passing that some of his inducing bids were higher than the Chandler Investment Company was apparently willing to offer, for portions of the Matson lands were struck off to the Bennett Trust Company, including parts of parcel 10, a part of parcel 13, parts

of parcel 14, and the whole of parcel 15. Indeed, the only lands purchased by the Bennett Trust Company were the Matson lands; this company did not buy any of the Lockhart property. H. A. Wells purchased the whole of parcel 7, a portion of parcel 3, and a part of parcel 13. The remainder of the mortgaged property was struck off to the Chandler Investment Company. It is not alleged that any part of any parcel sold for an inadequate price. True it is that the appellant suggests in its brief that the total price realized at the sale was considerably less than the sum of the release prices fixed on the several parcels in the agreement of trust; but it is also true that the plaintiff suggests that the difference merely represents the difference between the boom times of 1915 in that section and the normal conditions now prevailing there. At any rate it is not alleged by the bank in its objections to confirmation that any portion of the Matson lands was sold for an inadequate price. J. Albert Matson testified not only that he "did not make any objections to the sale" but also that he had no objection to the sale. When rendering his decision the trial judge said:

"There is no evidence in this case whatever, that any statement made by Mr. Liljeqvist, or any parties representing the Chandler Investment Company chilled the sale, or deterred any person whatever from bidding upon the property," and "so far as the records show the sale was regularly conducted and fairly made."

3. The plaintiff vigorously insists that it could not in a single proceeding foreclose both the first and the second mortgage, for the reason that the first note was the debt of four persons while the other was the debt of only two of them, and because the debt of the four persons was secured by all the land while the other debt was secured by only a part of the lands. It is not neces-

sary to decide whether both mortgages could have been foreclosed by the rendition of two money decrees in one suit, although it may with propriety be said that even though it be assumed that both mortgages could have been foreclosed in a single proceeding, nevertheless they could not have been consolidated into a single money decree: *Peck v. Hapgood*, 10 Met. (Mass). 172. In this connection see: 2 Jones on Mortgages (7 ed.), § 1234; 3 Jones on Mortgages (7 ed.), § 1458. We need not now decide whether both mortgages could have been foreclosed in one suit, for the reason that even though it could have been done, a mere voluntary failure to do it did not of itself operate as a cancellation of the debt and security. True it is that the second note and mortgage constitute a lien which is junior and subordinate to, and not senior and superior to, the first note and mortgage, and yet it was not entirely inaccurate to say that the purchaser of the Matson parcels took "subject to the mortgage for \$3,500," for every purchaser of Matson lands did in truth take subject to whatever right may arise out of the junior mortgage. While the word "subject" might convey different meanings to different persons, still it is the identical word which this court used in an analogous situation: *Sellwood v. Gray*, 11 Or. 534, 540 (5 Pac. 196).

4. Notwithstanding the language of Section 423, L. O. L., this court has consistently ruled, beginning with *Sellwood v. Gray*, 11 Or. 539 (5 Pac. 196), and ending with *Higgs v. McDuffie*, 81 Or. 256 (157 Pac. 794, 158 Pac. 953), that the failure to make a junior encumbrancer a party to the foreclosure of a senior encumbrance does not invalidate the decree, although the foreclosure of the first lien does not bar the equity of redemption available to the junior encumbrancer:

Osburn v. Logus, 28 Or. 302, 310 (37 Pac. 456, 38 Pac. 190, 42 Pac. 997); *Gaines v. Childers*, 38 Or. 200, 203 (63 Pac. 487). In other words, the purchaser of lands sold under a decree foreclosing a first mortgage can, where the holder of a second mortgage was not made a party to the suit in foreclosure, maintain a suit to compel the holder of the second mortgage to redeem, or be foreclosed; but this right to compel a redemption or be foreclosed proceeds on the theory that the second mortgage is still in existence and unpaid. The second note and mortgage given by the Matsons are still uncanceled *and* unpaid. The Chandler Investment Company, through its attorney, stated the truth when it made the announcement about the second mortgage.

The order confirming the sale is affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

Submitted on briefs January 27, reversed and remanded March 2, 1920.

KEE v. CARVER.*

(187 Pac. 1116.)

Trial—Findings of Fact to Dispose of All Issues Raised by Pleadings.

1. In trials by the court the findings of fact must be as broad as the issues and must dispose of all questions raised by the pleadings.

Logs and Logging—Failure to Find on Material Issues in Vendor's Action for Price of Timber held Error.

2. In action by vendor of standing timber for balance of purchase price against purchaser who had not removed all of the timber during the period provided therefor by the contract, where purchaser's allegation that by subsequent agreement the timber on part of the tract was eliminated from the original contract, and that on account of notice from vendor purchaser had suspended operations for certain period during life of contract were denied by vendor, court's failure to make finding on the issues so raised *held* material error.

*The question of title and right to stranded logs or timber is discussed in a note in 43 L. B. A. (N. S.) 460.

Logs and Logging—Timber Contract Conveys Title Subject to be Defeated on Grantee's Failure to Remove Timber Within Specified Time.

3. Contract of sale of standing timber operates to convey the present title to the timber, but the estate thus created is upon condition liable to be defeated on grantee's failure to remove timber within time specified.

Logs and Logging—Purchaser of Standing Timber cannot Recover Price Paid upon Failure to Remove Timber Within Required Time.

4. Purchaser of standing timber for a cash consideration under agreement to remove within specified time cannot recover money paid, upon his title to the timber being defeated by his failure to remove the timber within the time specified therefor.

Logs and Logging—Vendor not Entitled to Balance of Purchase Price for Timber not Removed Within Specified Period Where not Out and Manufactured into Cordwood for Purpose of Ascertaining Price as Required by Contract.

5. Where the purchase price for standing timber was to be ascertained by the actual cutting of the timber and the manufacturing thereof into cordwood which was to be measured as a basis for computation of the amount to be paid, vendor upon purchaser's failure to remove all of the timber within specified time could not recover balance of purchase price for amount not removed where such timber had not been cut and manufactured into cordwood, since vendor, relying on provision of contract requiring removal by certain date, is bound by other provision thereof as to ascertainment of price.

Logs and Logging—Vendor Required to Show Damages Suffered in Action for Purchaser's Failure to Remove Standing Timber Within Specified Period.

6. Vendor of standing timber cannot recover damages on purchaser's failure to cut and remove timber within specified period where price cannot be computed because dependent upon amount of cordwood into which timber can be manufactured, in the absence of a showing that he has suffered damages by purchaser's breach.

Logs and Logging—Vendor cannot Claim Full Contract Price as Measure of Damages for Purchaser's Failure to Remove Timber Within Specified Period and Keep Title to Timber.

7. Vendor of standing timber cannot, on purchaser's failure to remove a part of the timber within the specified period, claim the full contract price as a measure of damages for purchaser's breach in absence of showing of other damage sustained, and keep the title to the timber which reverted to him by the expiration of the period within which it was to be removed.

Logs and Logging—Complaint Insufficient to Show Damages to Vendor of Standing Timber Because of Purchaser's Failure to Remove Within Required Time.

8. In action by a vendor of standing timber against purchaser who failed to remove all of the timber within specified period, complaint alleging that vendor entered into an agreement to convey to third

party the land upon which the standing timber remained, without alleging that conveyance was actually made or that third party had performed contract entitling him to conveyance, *held* insufficient pleading of damages sustained by vendor because of purchaser's failure to remove timber within required period.

Logs and Logging—Standing Timber Goes With General Title to Land Upon Expiration of Period of Time Provided for Removal.

9. Where purchaser of standing timber fails to remove a portion of the timber within the required time, the standing timber goes with the general title to the land after expiration of the period provided for removal.

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc.

The parties admit that on August 23, 1916, they entered into a contract, the salient features of which are here quoted:

"This agreement made and entered into August 23, 1916, by and between William Kee, hereinafter called the vendor, and Stephen Carver, hereinafter called the vendee, witnesseth: That for and in consideration of the payment of the moneys hereinafter specified, and the covenants and conditions hereinafter mentioned on the part of the vendee to be kept and performed, the vendor does hereby bargain, sell and convey unto the vendee, the following described property, to wit: all of the sound timber suitable for cordwood * * now standing upon" certain lands described by metes and bounds, belonging to the vendor. "The vendee hereby agrees to pay for said timber the price and sum of \$1.00 per cord, stumpage."

As a means of ascertaining the amount of wood on the tract, the agreement provided for cutting two strips through the timber, measuring the wood thus obtained, and estimating the remainder; further, that if this method was not satisfactory to both parties, the vendee should cut twenty trees on the different tracts where the timber was yet standing, from which as a sample the cordage of the still uncut timber might be reckoned

and finally, if this estimate by sample was not adequate, "then, upon the amount of timber left standing, all of the remainder thereof shall be cut and payments shall be made on the first of each month (or as soon thereafter as the timber can conveniently be measured), for the timber cut during the preceding calendar month." It was further stipulated:

"The vendee hereby covenants and agrees that he will cut and remove all of the timber herein described from said premises by August 1, 1917."

Further covenants in the contract gave the vendee the right of ingress and egress by crossing other lands of the plaintiff. This instrument was signed and sealed by both parties in the presence of a subscribing witness.

After reciting the contract in full, the complaint declares in substance that the defendant, prior to August 1, 1917, cut and removed part of the wood, but there is still standing and was standing on that date a considerable portion of the timber. It is further stated that at the making of the agreement there were about 3,220 cords of sound timber suitable for cordwood within the meaning of the contract, on the lands described, and that the defendant paid only \$600 on account of the purchase price, leaving a balance of \$2,620. Afterwards, as averred in the complaint, the plaintiff entered into an agreement with Blaine R. Smith, covenanting to convey to him the land upon which the standing timber remained, subject, however, to the contract between the plaintiff and the defendant. The terms of this agreement with Smith are not set forth. Nor is it stated that the plaintiff has conveyed the land to Smith or that the latter has performed his part of that contract so as to be entitled to a conveyance.

Then follows this allegation :

“That by reason of the sale of the land and premises above referred to by the plaintiff to the said Blaine R. Smith and the failure of the defendant to cut and remove the timber growing and standing on the premises by August 1, 1917, the timber not cut and removed has reverted and plaintiff will lose the same and suffer the loss of the sum which the defendant agreed to pay of \$1 per cord for all the timber which the defendant has failed to cut and remove within the time specified in the contract between plaintiff and defendant.”

The complaint concludes with a statement of the amount which the plaintiff claims is due, as already set forth, and a demand for judgment.

The answer admits the cutting of part of the timber; that there is still standing a portion thereof on the premises, and that the defendant paid the plaintiff \$600 on account of the wood. After some denials the defendant alleges in substance, that the plaintiff and Smith represented to him that they had made a contract for the sale of the land to Smith, and that they desired to retain a part of the standing timber which they marked off on the tract and which they estimated at 392 cords; and that the defendant agreed to this and did not cut any of that timber. Substantially it is alleged that the parties failed to agree about the measurement of the timber by estimating it, and that, although the defendant was delayed on account of scarcity of labor, yet prior to the expiration of the contract, Smith and the plaintiff notified him to stop cutting timber and that they would not permit any more of it to be cut on the tract; that thereafter, in August, 1917, Smith locked the gates leading into the premises, whereby the defendant's ingress thereto was cut off, and that by reason of the notices to cease cutting timber the defendant did stop cutting and hauling

for about thirty days in March and April, and finally entirely ceased to cut and haul timber on account of the closing of the gates. Predicated upon the same matter, the defendant claims that the plaintiff is estopped from asking or recovering compensation for more than the actual amount of the timber cut and taken away. The new matter in the answer was traversed by the reply.

On trial before the court without a jury the judge entered findings of fact to the effect that the contract was made as stated and set out in the complaint, in pursuance of which the defendant cut 560 cords prior to the expiration of the contract and left on the premises 948 cords, owing after deducting the \$600 payment a balance of \$908 due, for which as a conclusion of law it was found the plaintiff was entitled to a judgment, which was entered accordingly. The defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief submitted over the name of *Mr. Julius N. Hart*.

For respondent there was a brief prepared and submitted over the names of *Messrs. Miller & Wilkinson* and *Mr. James P. Stapleton*.

BURNETT, J.—1, 2. One ground of error assigned is that the court did not make findings on all of the issues raised by the pleadings. It is well settled that in trials by the court the findings of fact must be as broad as the issues involved and must dispose of all those questions: *Chung v. Stephenson*, 50 Or. 244 (89 Pac. 386). The findings make no allusion to the denied allegation of the defendant's claim that by subsequent agreement the timber on part of the tract was eliminated from the original contract and that on account of notices

from the plaintiff and Smith he suspended operations for thirty days during the life of the contract. This of itself was material error.

3-5. As decided in *Anderson v. Miami Lumber Co.*, 59 Or. 149 (116 Pac. 1056), the contract here in question operates to convey the present title to all the timber on the tract, but the estate thus created was one upon condition liable to be defeated on failure of the grantee to remove the timber within the time specified. If this had been a cash transaction and the parties had agreed upon the amount of the purchase price, the defendant by paying the money in advance would have purchased at the risk of the defeat of his title by the condition subsequent, that he should remove the timber by a certain time, and he would have had no ground for recovering money from the plaintiff. So, in the instant case, on the record before us the defendant admittedly paid to the plaintiff \$600, the price of 600 cords of wood. It is the defendant's misfortune if he got for that payment only 560 cords, unless some fault of the plaintiff brought about that result. But there is another condition to this contract which must be taken into consideration. In the ultimate analysis the purchase price to be paid must be ascertained by an actual cutting of the timber and manufacturing it into cordwood, which is to be measured as a basis of computation of the amount to be paid. The present action is instituted to recover the balance of the purchase price and not damages for a breach of the agreement. But under the contract pleaded, the purchase price is incapable of computation. If the plaintiff insists on the provision that the wood is to be cut and removed by August 1, 1917, he must also take the consequence of being bound by the method stipulated for ascertaining the price to be paid. As already

pointed out, this can be determined, in face of failure to agree upon estimates, only by cutting the wood and actually measuring it. The contract is executory in that respect; and until it is executed according to its terms, no action will lie for the purchase price *eo nomine*.

6, 7. Conceding that the defendant breached the contract by failing to remove the timber by August 1, 1917, still, in the absence of the means by which the price can be computed, the plaintiff must show that he suffered damages, before he can recover. If he retained title to the land and nothing else was shown, he could not, as a measure of damages, claim the full contract price and keep the title to the timber which reverted to him by the expiration of the period within which it was to be removed.

8, 9. It remains to be seen whether the allegation about the agreement with Smith alters the case. It is not stated that a conveyance was actually made to Smith. Neither is it charged that he has performed the contract entitling him to conveyance. Conceding that the title to the yet standing timber has been taken from the defendant by reversion, it does not follow that it reverted to Smith, and hence was lost to the plaintiff. In other words, the standing timber goes with the general title to the land after the lapse of Carver's interest, and it is not disclosed that Smith succeeded to the general title. For all that appears, Kee yet has the land and standing timber, in which case he cannot keep the timber and recover the purchase price. It is not apparent that the plaintiff has suffered any damages up to this time by reason of the failure of the defendant to remove the timber. The conclusion is that the judgment must be reversed and the cause remanded to the Circuit Court for further proceedings.

REVERSED AND REMANDED.

Argued January 6, reversed and dismissed February 10, rehearing denied March 9, 1920.

RIGGS v. ADKINS.

(187 Pac. 303.)

Frauds, Statute of—Possession Taking Oral Contract to Convey Land Out of the Statute.

1. To take an oral contract to convey land out of the statute of frauds, the necessary possession must have been taken by the purchasers under and in pursuance of the contract, and it is not enough that they were already on the land by virtue of some other arrangement with the seller, as that of his employees, but there must have been such an open and notorious change to the status of purchasers in possession as to have attracted the notice of other people.

Specific Performance—Oral Contract to Devise Land to Employees not Enforceable in Absence of Showing of Change in Character of Possession.

2. Decedent's oral contract to devise to his employees certain land not specifically described, on which he and the employees were living, it being uncertain whether the land was to be devised to the employees or to them and their children, held not specifically enforceable against decedent's administrator and his heir, in the absence of showing there was any change in possession by employees as such to possession as purchasers or prospective devisees.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1.

The substance of the complaint in this suit is that James Adkins, now deceased, was the owner of some land therein described and that for about nineteen years prior to his death he made his home with the plaintiffs, who are husband and wife, and about May, 1905, he agreed with them that he would convey, deed, devise or will the realty to them to take effect on his death, on condition that they would live on the property, keep house and maintain a home for him thereon and perform such other services as he might from time to time demand. The plaintiffs claim to have performed their part of the contract, specifying that they provided his food and board, did his laundry work for

him, nursed and cared for him during some illness, and that Nettie Riggs, one of the plaintiffs, for a period of fourteen years cooked for his logging and mill crews, consisting on an average during that time of from eight to fifteen men, and received no other consideration than the promise of Adkins at that time to convey the lands to the plaintiffs. It is said in the complaint that:

“The said James Adkins has always during said time treated the said property as the property of these plaintiffs, and plaintiffs have lived upon, improved, fenced and generally cared for said lands.”

They say that Adkins often had promised that he would have papers prepared in fulfillment of the alleged agreement, but if they ever existed they have not been found or have been destroyed, and he died holding the legal title in his name. Their prayer is to the effect that the administrator and the mother of the deceased, who is his only heir, be declared to hold the land in trust for the use and benefit of the plaintiffs, and for further relief.

The making of the contract is denied by the answer. It is averred in effect that instead of Adkins living with the plaintiffs they lived with him and were paid by him for all their services besides having the use of the property and their sustenance, derived in large part from material produced on the premises. This in turn was denied by the reply. From a decree according to the prayer of the complaint the defendants appeal.

REVERSED AND DISMISSED.

For appellants there was a brief over the names of *Mr. Earle C. Latourette* and *Messrs. C. D. & D. C. Latourette*, with an oral argument by *Mr. Earle C. Latourette*.

For respondents there was a brief over the names of *Messrs. Brownell & Sievers*, with an oral argument by *Mr. C. T. Sievers*.

BURNETT, J.—The facts appear to be that as early as 1898 Adkins was running a sawmill in Clackamas County and employed the plaintiff L. G. Riggs in the operation of the same. He afterwards engaged the plaintiff Nettie Riggs to cook for the mill-hands at an agreed price of \$20 per month, together with the housing and board for herself and family, consisting of her husband and two children. They went upon the premises for that purpose and continued there for about a year, when, as the plaintiffs declare, the agreement in question was made orally. Without dispute, the husband continued to receive pay for his services in the mill. The wife says that this was sufficient for the maintenance of the family, outside of what they otherwise received from the decedent, in consequence of which she did not draw any of her wages, although she might have had them for the asking. After the alleged agreement was made, the decedent bought three other pieces of property, all of which are included in the description mentioned in the complaint. Among others, of those bought subsequently he took conveyance from the plaintiffs themselves of one of the tracts. The plaintiffs say there never was any change in the terms of the contract; yet they say he bought from them this land for which he never paid, but that they forgave him the debt, and claim this same land was to be theirs after his death.

Speaking of the contract, his wife testified that what they were to get was "the property where the mill sat, where we lived at that time." They were then living in a house near the mill already on the land when they

went there, which is not to be mistaken for the one built later and hereinafter mentioned. She was unable to state how many acres were in the tract to be conveyed, and neither witness pretends to give any definite boundary of the property they were to have. The wife was uncertain about who were to be the grantees. On that point her testimony is to this tenor:

She said, "We were to get the place." Asked, "Whom do you mean by 'we'?" she answered, "My husband, myself and my family."

"Q. And your family?"

"A. Yes, sir. He intended it for a home for us all. That is what he said.

"Q. Did he say 'family'?"

"A. He said 'us all.' He said when he was through with it it was ours. It belonged to us.

"Q. 'Us'?"

"A. No, sir. He said, 'This belongs to you folks.'

"Q. Did he mention any names when he said 'you folks'?"

"A. No, sir. I suppose we would know enough to know what he meant when he was talking direct to us.

"Q. Did he mean you and your husband and the children?"

"A. He meant it was for all of us; yes, sir.

"Q. What children have you?"

"A. I have two.

"Q. They are living with you, are they?"

"A. One of them. That is, that is his home. My daughter is married."

The decedent at his own expense built a dwelling-house on the premises in 1907, which he and the plaintiffs and their family occupied without any apparent change in the previous arrangement whereby the plaintiffs were there as employees. He paid all the taxes and in his dealings with other people always claimed the property as his own. Indeed, the testimony on

the part of the plaintiffs themselves is that he claimed the property.

Adkins was suddenly killed on June 30, 1917, by a locomotive when he was running to catch a train. After his administrator was appointed he was told by the plaintiff in substance that Adkins owed the latter for the land bought from the plaintiffs. The plaintiff L. G. Riggs at that time also inquired of the decedent's personal representative when the plaintiffs would be required to vacate the premises now in question. The nearest approach to an averment of possession of the property sufficient to take the transaction out of the statute of frauds is the allegation of the complaint "that plaintiffs have lived upon, improved, fenced and generally cared for said lands." Without dispute, the genesis of the relation between the parties whereby the plaintiffs went upon the property is found in the relation of employer and employee. This continued throughout the course of years until the sawmill burned and part of the land had been leased to another sawmill operator. For all that would appear to an observer, the previous relation continued.

1. As stated in *Roberts v. Templeton*, 48 Or. 65 (80 Pac. 481, 3 L. R. A. (N. S.) 790, note), in order to take the transaction out of the statute of frauds, the necessary possession must have been taken under and in pursuance of the contract. It is not enough that the would-be purchasers are already on the land by virtue of some other arrangement. There must be such an open and notorious change of the previously existing relation as to attract the notice of other people. In 3 L. R. A. (N. S.) the *Roberts-Templeton* case is thoroughly annotated on this point. The subject is further examined in *Le Vee v. Le Vee*, 93 Or. 370 (181 Pac. 351). A substantially parallel case holding adversely

to the litigant seeking to enforce the conveyance is *Herr v. McAllister*, 92 Or. 581 (181 Pac. 741). There, the plaintiff claimed under an oral contract said to have been made with the then owner of the land, since deceased, whereby she was to take care of his house and home and look after him during the remainder of his life, which service she claims she performed. She had been in that employment for hire and was on the premises in pursuance thereof prior to the time the agreement was said to have been made. The owner of the realty made a will disposing of all his property except that in question. Still later, he made a codicil to his will which, however, was not produced but was described orally, whereby he bequeathed this very property to the plaintiff, but it was not attached to his will and was not found. In the respects mentioned the case there was much stronger for the claimant than in this instance, yet this court in an opinion by Mr. Justice JOHNS refused to enforce the contract.

2. In the present litigation the agreement is uncertain as to the particular tract to be transferred. It is uncertain to whom it was to be conveyed or devised, whether to the plaintiffs themselves or to them and their children. There is no sufficient showing that there was any change in the previous relation of the parties respecting the land. All they did while on the premises is quite consistent with the former agreement and does not constitute proof of taking that possession of the property which should always be shown in dealings between parties who are not related to each other by ties of consanguinity or affinity. To take property from the estate of a decedent whose mouth is closed by death and who in his dealings with other parties always asserted his ownership of the land, when there is nothing to support the claim bet-

ter than mere oral testimony which narrates events and actions easily referable to another agreement, would be to open the doors wide to possible fraud in the very face of the statute.

The pleading is deficient in that it does not directly aver that the parties took possession by virtue of the contract. In the same respect the testimony itself is wanting. The result is that the decree of the Circuit Court must be reversed and one here entered dismissing the suit, but without costs or disbursements to either party.

REVERSED AND DISMISSED. REHEARING DENIED.

BENSON, HARRIS and BENNETT, JJ., concur.

Argued February 11, modified and affirmed March 9, 1920.

JUANTO *v.* WRIGHT.

(187 Pac. 1036.)

Appeal and Error—View by Court Adds Advisory Weight to Finding of Court.

1. Regardless of the right of the court to use facts disclosed by view as substantive evidence, such a view adds to the advisory weight of the findings of the court.

Trial—Finding Should not be Made on Issue Outside Case.

2. In an action to enjoin interference with repair of a ditch in which the only question at issue was repair or enlargement, a finding on the extent of plaintiff's water right in ditch should not have been made.

From Lake: L. F. CONN, Judge.

Department 2.

This is a suit to enjoin the defendant from interfering with the work of the plaintiff, upon a certain ditch owned and used by the plaintiff across the land

of the defendant, carrying water diverted from Thomas Creek to the lands of the plaintiff, below those of defendant.

The real question in the case is as to whether the plaintiff and his employees at the time in question were engaged in simply cleaning out and repairing the ditch in question, or were enlarging the same.

The testimony of the plaintiff and one of his employees, who was working with him at the time, is to the effect that they were only cleaning out and repairing the ditch. The testimony of the defendant, on the other hand, is that they were enlarging the ditch; that he made no objection to plaintiff using the ditch or repairing the same, but did object to its enlargement; and that when he remonstrated with the plaintiff in relation to the enlargement they had words, and he finally ordered plaintiff off the place. There is no evidence of any actual physical interference with the work by the defendant.

The testimony is none too definite and full, on either side; there is no evidence whatever as to the size of the ditch, either before or after the work in question, and no evidence on either side as to the amount of water which had been carried through the same.

The court below, upon an agreement between the parties, viewed the premises and had the points in controversy along the ditch pointed out to him by their respective engineers.

Among other findings, the court made the following:

“That on either the sixteenth or seventeenth day of October, 1917, the plaintiff, Simon Juanto, together with his employees, went upon the lands of the defendant, G. W. Wright, traversed by said ditch, and wrongfully commenced enlarging said ditch beyond its original capacity, under the pretense that he was simply cleaning out the debris accumulated in said ditch, and

that while so wrongfully trespassing upon the premises of defendant for the purpose of enlarging said ditch under such pretense, the defendant, without any force or violence, after remonstrating with the plaintiff about enlarging the ditch in question, ordered him off his land.

“That defendant never objected to the cleaning out of the ditch by plaintiff, but simply forbade him to enlarge the same.

“That the ditch has been enlarged was most apparent to the court, from its appearance, when inspected by him, under the agreement of counsel, as the banks showed that the solid earth which had never before been disturbed, had been removed and the ditch materially enlarged.”

The decree of the court was as follows:

“This cause having been duly tried by the court, and the court having heretofore made and filed herein its findings of fact and conclusions of law based thereon, and now having duly considered the same, and at this time being fully advised in the premises,

“It is hereby considered, ordered, adjudged and decreed, that this cause be dismissed, the temporary injunction herein dissolved, and that defendant have and recover of and from the plaintiff, his costs and disbursements herein, taxed at \$——.”

From this decree plaintiff appeals to this court.

MODIFIED AND AFFIRMED.

For appellant there was a brief over the names of *Messrs. Snow, Bronaugh & Thompson* and *Mr. H. P. Welch*, with an oral argument by *Mr. W. Lair Thompson*.

For respondent there was a brief submitted over the name of *Messrs. Batchelder & Combs*, without oral argument.

BENNETT, J.—The evidence in the cause is squarely conflicting, as to whether the work of the plaintiff was a mere repair or an enlargement.

The court below heard the evidence and had an opportunity to observe the apparent character and the manner of the witnesses. He also had an opportunity to weigh their testimony in the light of the conditions and circumstances as disclosed to him by his view of the premises.

1. Whether or not the facts disclosed on such a view of the premises are substantive evidence which the court had a right to consider independently, there may be a question. But it is well settled that such a view adds to the advisory weight of the findings of the court below.

In *Montgomery v. Shaver*, 40 Or. 244 (66 Pac. 923), the question was as to the location of the line of ordinary high water, and Mr. Justice WOLVERTON, delivering the opinion of the court, said:

“But what lends peculiar weight to the finding is that the learned trial judge visited the *locus in quo* by consent of the parties, and located the point upon the ground. Under such circumstances, the case to the contrary should be a clear one to warrant this court in locating it elsewhere, and manifestly such a case is not presented by the record.”

In *Sun Dial Ranch v. May Land Co.*, 61 Or. 205, 218 (119 Pac. 758, 763), Mr. Justice BEAN, delivering the opinion of the court, said:

“Were we to try the case *de novo*, we should be compelled to remember that the trial court had a peculiar advantage in inspecting the premises at two different seasons of the year, and * * this would lend a peculiar weight to the findings.”

And in *Molalla Electric Co. v. Wheeler*, 79 Or. 478 (154 Pac. 686), it was said by Mr. Chief Justice MOORE:

“When in an equity suit the trial judge personally examines the *locus in quo*, in order properly to apply the testimony received to the issues involved, his findings

of fact and the decree predicated thereto are entitled to careful consideration. In the case at bar an examination of the testimony given by the plaintiff's witnesses does not, in our opinion, overcome the findings as to such value, corroborated as it was by the judge's view of the premises."

In this case, it appears from the findings of the court that the findings were made upon the evidence of the parties, viewed in the light of the personal examination by the court. At the beginning of the findings it is said:

"The court, having duly considered the testimony adduced at the trial by the several witnesses who testified on behalf of the respective parties, and with the aid and in the light of the facts and circumstances as the same appeared to the Court upon viewing the ditch and right of way, now makes and files the following findings of fact."

Under these conditions, we do not feel as though we would be justified in disturbing the findings of the court as to the enlargement of the ditch, or the decree resting thereon.

2. The court, however, in addition to the findings upon the question directly involved in the case, made a finding in relation to the extent of plaintiff's water right in Thomas Creek, which finding was as follows:

"That one J. O. George, on or about the tenth day of February, 1879, then being the owner of the lands above mentioned and from whom plaintiff derives his title, made an appropriation of the waters of Thomas Creek, and caused a notice of appropriation in which said J. O. George claimed an appropriation of four hundred inches, to be filed with the county clerk of Lake County, Oregon, which notice was by him recorded in Vol. I, Record of Water Rights of said County and State, at page 66 thereof, but the amount of water appropriated by said J. O. George did not exceed fifty inches, for the irrigation of the lands of the plaintiff hereinbefore described, and that no greater amount

than one hundred inches of the waters of said stream was ever appropriated by said J. O. George, and that no greater amount than fifty inches of such water so appropriated was ever used or applied to the above described lands of this plaintiff."

There is no evidence whatever, in the case, in relation to the extent of this water right belonging to the plaintiff, and it seems from the briefs of both of the parties hereto, that it was stipulated and agreed in the court below:

"That the only issue in the case was whether Juanto was merely cleaning out the ditch, or whether he was enlarging it at the time Wright ordered him off the premises, and that the question of water right is not involved."

Under these circumstances the majority of the court are of the opinion that this finding is outside of the issues tried by the parties, and might be embarrassing to the plaintiff, when the time shall come, if it ever does, when his water rights are really in litigation. This finding is therefore disapproved, but the decree of the court below is in all other respects affirmed. Neither party shall recover costs upon this appeal.

MODIFIED AND AFFIRMED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued February 24, affirmed March 9, 1920.

MILLER v. HOWARD.

(158 Pac. 160.)

**Master and Servant—Proof of Reasonable Value of Services
Admissible Under Complaint.**

1. A complaint alleging that, at the request of defendant, plaintiff performed services for the sum of \$60 per month and her board, the reasonable value thereof, which sum and board defendant agreed to furnish and pay, states a cause of action for the reasonable value of the services, permitting proof of such value, and is not founded upon an express contract.

**Pleading—Allegations in Complaint to be Liberally Construed Where
not Objected to.**

2. Where it was doubtful whether a plaintiff stated a cause of action for the reasonable value of services or on a contract to pay a given sum for stated work, and it was not objected to, it should be construed in favor of whichever theory was supported by the testimony.

**Appeal and Error—Admission of Evidence not Affecting Issue
Harmless.**

3. In action for value of services rendered, where defendant claimed that they were rendered under a lease of his land for one year which plaintiff abandoned and plaintiff denied execution of a one-year lease, or that the services were performed under it, testimony of plaintiff to the effect that there was some discussion about a five-year lease which was never executed could not have been prejudicial.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2.

The plaintiff alleges that at the special instance and request of the defendant she performed work, labor and services for him from October 16, 1917, until May 1, 1918, namely, housework and nursing and care of the defendant, "for the sum of \$60 per month and her board and lodging, the reasonable value thereof, which said sum and said board and lodging said defendant then and there agreed to furnish and pay the plaintiff"; and that there is due and owing on account thereof the sum of \$388. As a second cause of action

she alleges that in like manner, between the same dates, her husband, Ed Miller, performed work, labor and services for the defendant "of the reasonable value of \$60 per month and his board and lodging," for which there is \$374 due and owing; and that this claim is assigned to the plaintiff.

The defendant makes a general denial of all of the material allegations of the complaint, and for a further and separate answer alleges that about October 16, 1917, the plaintiff and Ed Miller, her husband, entered into a contract with the defendant whereby they "leased and rented his ranch for the term of one year" upon certain specified terms therein alleged; that any work done by either of them was performed pursuant to such agreement; and that in May, 1918, "plaintiff and her said husband, Ed Miller, against defendant's will and without his consent, abandoned said contract and went away from defendant's place." He pleads a like defense to the second cause of action.

In her reply the plaintiff denies the leasing as alleged and avers that—

"The defendant agreed to enter into a contract and agreement with said Ed Miller whereby said defendant agreed to lease and rent his ranch to said Ed Miller."

The trial resulted in a verdict for plaintiff for \$400, upon which judgment was entered. The defendant appeals.

During the trial plaintiff as a witness was asked, "What would you say was the reasonable value of your services?" The defendant objected "to the introduction of any evidence tending to prove the reasonable value of the labor and services performed by Mary A. Miller on the ground that the plaintiff has sued the defendant on an express contract." The objection was overruled, and exception was taken and allowed. The witness was permitted to testify "that

the reasonable value was \$60 per month, and board and lodging." She was then asked:

"State, now, whether your husband had a contract with Howard, whether your husband and Mr. Howard had an agreement, in regard to leasing the premises to your husband for a period of five years."

The defendant objected to the introduction of oral evidence tending to show an agreement of leasing for a period longer than one year, on the ground that it violated the statute of frauds, which objection was overruled, with exception duly taken and allowed. Similar testimony was offered as to conversations between the parties concerning the five-year lease. The defendant assigns such rulings of the trial court as error, and that is the only question presented.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Oliver M. Hickey*.

For respondent there was a brief over the names of *Mr. Guy C. H. Corliss* and *Messrs. Giltner & Sewell*, with an oral argument by *Mr. Corliss*.

JOHNS, J.—1. As we analyze the first cause of action, it is simply an allegation that the plaintiff performed work, labor and services for the defendant for which she was to receive her board and lodging and \$60 per month as the reasonable value of such labor and services. We do not construe it to be founded upon an express contract. It is alleged that \$60 per month with her board and lodging is the reasonable value of the labor and services rendered. There was no motion filed requiring the plaintiff to elect or to make the complaint more definite and certain.

The plaintiff sued for \$762. The jury returned a verdict in the sum of \$400, from which it is apparent

that the judgment was not based upon an express contract.

In *West v. Eley*, 39 Or. 461 (65 Pac. 798), this court held:

"After pleading over, the allegations of a pleading should be liberally construed in favor of the pleader; thus, where it was doubtful whether a complaint stated a cause of action for the reasonable value of services, or on a contract to pay a given sum for stated work, and it was not objected to until after the evidence was in, it should be construed in favor of whichever theory was supported by the testimony.

"A complaint counting on the reasonable value of services may be supported by evidence of a contract for the amount demanded, and the latter will be construed to be the reasonable value, this to the accomplishment of substantial justice."

2, 3. That case is decisive of the point raised here on the question of pleadings. Neither do we think there is any merit in the objection to the testimony concerning the five-year lease. Plaintiff seeks to recover for the value of alleged services. Defendant claims that the alleged services were rendered under a lease of his lands for a period of one year, and that without his consent the plaintiff and her husband abandoned the contract and left his premises, by reason of which they are not entitled to recover. Plaintiff denies the execution of the one-year lease or that the services were performed under it, and claims that there was some discussion about a five-year lease which was never executed. These were the issues upon which the case was tried and the jury found the verdict. In any event, the testimony about the lease was not prejudicial.

The judgment is affirmed.

AFFIRMED.

BENSON, BEAN and BENNETT, JJ., concur.

Argued on motion to dismiss the appeal January 28, appeal dismissed March 9, 1920.

CHANDLER v. TODD.

(188 Pac. 161.)

Appeal and Error—Appeal Perfected Five Days After Service and Filing of Undertaking.

1. In respect to the time for filing the transcript, an appeal was perfected June 20th, where notice of appeal was filed June 10th, and the undertaking on appeal was served and filed June 14th; five days being allowed for excepting to the surety by Section 550, L. O. L., as amended by Laws of 1913, page 617.

Appeal and Error—Order Extending Time for Filing Transcript After Time has Expired is Ineffective.

2. An order extending the time for filing the transcript made after the time as previously extended had expired was not made within the time allowed to file the transcript, as required by Section 554, subdivision 2, L. O. L., as amended by Laws of 1913, page 619.

Appeal and Error—Filing of Transcript or Abstract Within Time Specified is Jurisdictional.

3. The filing of the transcript or the required abstract of the record within the time specified by the statute is jurisdictional, without which the Supreme Court has no authority to proceed to hear the case.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2.

This is an action upon an injunction bond executed by defendant N. M. Todd with the Massachusetts Bonding and Insurance Company as surety, and filed in a suit in Washington County, in which N. M. Todd was plaintiff and E. M. Chandler et al. were defendants, restraining defendants from removing wood or timber and other property from certain land. The order of injunction was issued May 31, 1916. On June 15, 1916, Todd filed an additional undertaking by order of the court to prevent the release of the injunction, which is the instrument sued on. At the time, plaintiff Chandler had about 700 cords of wood cut on the land which he had contracted to sell and

in order to deliver the wood it was necessary to haul it during the dry summer season of 1916, which Chandler was prevented from doing by the injunction. During the summer of 1916, while the injunction was in force, a fire broke out in the woods near the cordwood and destroyed about 320 cords of it.

Chandler employed counsel and moved to vacate the injunction. On September 2, 1916, the same was set aside and annulled. This action was brought against the defendants to recover the damages sustained by Chandler as the natural and proximate result of the wrongful injunction. The cause was tried before the court and a jury. Based upon the verdict of the jury, a judgment was entered on April 8, 1918, for the sum of \$512.50. **APPEAL DISMISSED.**

Mr. G. E. Hamaker, for the motion.

Mr. Allan R. Joy and *Mr. D. P. Price*, *contra*.

BEAN, J.—The plaintiff moves to dismiss the appeal for the reason that the transcript of the record was not filed within the time allowed by law.

1. Notice of appeal was filed June 10, 1918. Undertaking on appeal was served and filed June 14, 1918. Allowing five days for exceptions to the surety on the undertaking, the appeal became perfected on June 20, 1918. See Section 550, L. O. L., as amended by Chapter 319, Laws of 1913, page 617. The transcript was filed in this court on November 18, 1918.

Section 554, L. O. L., as amended by Chapter 320, Laws of 1913, page 618, requires the appellant to file the transcript within thirty days after the appeal is perfected, or within such extended time as may be allowed by order of the trial court or judge

thereof, or the Supreme Court or a justice thereof, made within the time allowed to file the transcript and not extending the time beyond the next term of this court following the appeal. Appellant had thirty days from June 20, 1918, or until July 20, 1918, to file the transcript: *Cauldwell v. Bingham & Shelley Co.*, 84 Or. 257, 260 (155 Pac. 190, 163 Pac. 827).

July 13, 1918, the time for filing the transcript, was, by order of the Circuit Court, extended thirty days or until and including August 19, 1918. By a like order of July 25, 1918, such time was extended for a further period of thirty days which would be to and including September 18, 1918. The extension was computed in the order as being to and including September 12, 1918.

An order dated September 14, 1918, was by a judge of the same court made extending the time for settling the bill of exceptions, and extending the time for filing the transcript to and including September 30, 1918. By an order of the Circuit Court of November 25, 1918, the last above order was entered *nunc pro tunc* as of September 12, 1918.

On September 25, 1918, an order was duly entered extending the time for filing the transcript to the end of the first day of November, 1918. On October 14, 1918, an order was made by the Circuit Court extending such time for five days, or until the close of November 6, 1918. This order was entered on November 12, 1918, *nunc pro tunc* as of October 14, 1918.

2, 3. After the expiration of the time for the filing the transcript as extended, to wit, on November 7, 1918, an order was made purporting to extend the time for filing the transcript herein until and including November 18, 1918. The latter order was not "made

within the time allowed to file the transcript," as required by Section 554, L. O. L., subdivision 2 as amended. This section of the statute provides that if the transcript or abstract is not filed with the clerk within the time provided, the appeal shall be deemed abandoned and the effect thereof terminated. No abstract was filed by appellant until January 24, 1919. Therefore the appeal was abandoned. The filing of the transcript or the required abstract of the record, within the time prescribed by statute, is jurisdictional without which this court has no authority to proceed to hear the case: *Emery v. Brown*, 63 Or. 264 (127 Pac. 682). Section 554, subdivision 3, L. O. L., provides that, if the appeal be abandoned, the judgment for recovery of money may be enforced against the sureties on the undertaking for a stay of proceedings.

The motion to dismiss the appeal is granted. Judgment against defendants and their surety will be ordered entered enforcing the judgment of the lower court, pursuant to Section 554, subdivision 3, L. O. L.

APPEAL DISMISSED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued February 3, affirmed March 9, 1920.

GRIFFA v. MONMOUTH.

(188 Pac. 163.)

Municipal Corporations—Statutes—The Word "Provided" Construed—Public Highways Within City Subject to Improvement by City.

1. The usual office of the word "provided" in a statute is to create a condition or to restrain the enacting clause, to except something which would otherwise be in it, or in some manner modify it, but, under Laws of 1899, page 472, Charter of City of Monmouth,

Section 29, authorizing the common council to lay out, establish, vacate, and open streets, "provided that all public highways and roads within the corporate limits of said city become streets," a highway within such limits became a street, "provided" having been inartistically used as a conjunction, despite Laws of 1917, page 78, expressly giving the city jurisdiction over such highway by name.

[As to the proviso in a section of a statute as applying to other sections, see note in *Ann. Cas.* 1913E, 658.]

From Polk: HARRY H. BELT, Judge.

Department 2.

This is a suit brought to enjoin special street assessments made by the defendant city against the property of plaintiffs, the grounds of the controversy being as follows:

The common council of the town of Monmouth, Oregon, a municipal corporation, improved the portion of the thoroughfare in said town, termed "Main Street," from the west line of Monmouth Avenue to the east line of Broad Street, by grading and hard-surfacing the same, building concrete curb lines and installing a system of storm sewers, and attempted to assess each lot or tract of land abutting thereon with the entire cost of the improvement in front of such lots or tracts, from the property line to the middle of the thoroughfare improved, under the "front-foot" rule. The proceedings were conducted under the Charter of Monmouth enacted by the legislative assembly February 6, 1899 (Laws 1899, p. 472). For the purpose of this appeal, it is conceded by appellants that the proceedings concerning the improvement were conducted substantially in accordance with the charter. The facts, with the exception of whether the thoroughfare was and is a *county road* or a *city street*, and whether the town of Monmouth had authority to make the improvement and assess the abutting property with the cost thereof, are stipulated. It is also con-

ceded by the appellants that, if the thoroughfare improved was not a *county road*, and the town of Monmouth had authority under the present charter to improve the same, and assess the abutting property with the cost thereof, the assessments attempted to be levied on the appellant's property are valid, and the suit should be dismissed. On the other hand, it is conceded by respondents that, if the thoroughfare improved is a *public county road*, the town of Monmouth was without authority to improve the same and create a special lien against the abutting property for the cost thereof, and the relief asked for in the complaint should be granted.

Suit was brought by the appellants, who own land abutting on the improved thoroughfare, to have the special assessments against their respective lots or tracts decreed illegal and the sale of same enjoined, and their titles quieted as against the town of Monmouth. The findings and decree of the lower court were in favor of the defendants and plaintiffs appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. George J. Perkins*.

For respondents there was a brief and an oral argument by *Mr. Oscar Hayter*.

McBRIDE, C. J.—From the above statement, which is taken largely from appellant's brief, it will be seen that the only question to be decided is whether or not the thoroughfare known as "Main Street" is a county road or a city street. If it is a county road the appellants must prevail. If it is a city street, appellants concede that the decree of the Circuit Court must be affirmed.

By an act approved February 6, 1899 (Gen. Laws 1899, p. 472), a new charter was granted to the City of Monmouth, whereby it was granted, among other things, the authority "to grade, pave, macadamize, plank or otherwise improve, clean and keep in repair streets, highways, alleys, cross-walks and bridges."

Section 29 of said act is as follows:

"The common council is authorized and empowered to lay out, establish, vacate, widen, extend and open streets and alleys in said city, and appropriate money for that purpose; and to establish and alter the grade of any street or any part thereof, and to construct and improve sidewalks, pavements, streets and parts of streets within the city limits, making full or partial improvements thereon, and to establish a system of sewerage and to construct and repair drains and sewers; and it has full power to determine and provide for everything necessary and convenient for the exercise of authority herein granted; *provided*, that all public highways and roads within the corporate limits of said city become streets and subject to the supervision and control of the common council."

The contention of appellants is, that the word "provided" in the section quoted, should be construed as a condition having reference to some future action to be taken to convert the then existing roads and highways into streets, and that said section did not, by its own force, convert such ways into streets.

1. It is a rule sustained, not only by the numerous authorities cited by counsel for applicants, but substantially by all the authorities, that the usual office of the word "provided" in a statute is to create a condition or to restrain the enacting clause, to except something which would otherwise be in it, or in some manner modify it. But, while this may be stated as the general rule, it is not absolute.

In *Georgia R. R. & Banking Co. v. Smith*, 128 U. S. 174 (32 L. Ed. 377, 9 Sup. Ct. Rep. 47), Justice Field said:

“The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term ‘provided,’ so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater significance than would be attached to the conjunction ‘but’ or ‘and’ in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.”

To the same effect are, *Considine v. Metropolitan Life Ins. Co.*, 165 Mass. 462 (43 N. E. 201); *Smalley v. Ashland Brown-Stone Co.*, 114 Mich. 104 (72 N. W. 29); *Terrell v. City of Paducah et al.*, 122 Ky. 331 (92 S. W. 310, 5 L. R. A. (N. S.) 289); *Brace v. Solner*, 1 Alaska, 361; *Carter Webster & Co. v. United States*, 143 Fed. 256 (74 C. C. A. 394), and many other cases.

To construe the language referred to as a proviso or condition would lead to the result that the common council could not exercise any of the powers granted in the preceding portion of the section, except upon the condition that the public highways and roads in the city should first become streets, and, as there was no method provided by which they could become

streets, except by an act of the legislature, the powers granted would remain in a state of paralysis until the legislature should, by another act, declare such roads to be streets.

We cannot assume that it was the legislative intent to bring about so absurd a result or to merely hint at what might be done, should another legislature see fit to pass an act making such public ways streets, but that the actual intent was to transform the public roads and highways in the city immediately into streets.

Following the theory of the cases last cited, and taking into consideration the conditions which existed when the charter of 1899 was enacted, we hold that the word "provided" in Section 29 of the charter, was not intended as a condition, but was inartistically used as a conjunction, and that the clause in question should be construed as if, instead of the word "provided," the conjunction "and" had been used, or the phrase "it is further provided" had been employed.

The fact that the legislature, after these proceedings were begun, passed an act expressly giving the City of Monmouth jurisdiction over "the highway known as Main Street" did not alter the effect of the charter of 1899. If the city already had such jurisdiction under that charter, and we hold that it did have, a subsequent act again granting it could not take away the jurisdiction originally granted.

The act alluded to and which became effective February 7, 1917 (Chapter 55, Gen. Laws 1917), recites that "at this time there exists confusion concerning the jurisdiction of the City of Monmouth over said highway, within the corporate limits thereof." This

confusion was evidently caused by the contention made by plaintiffs in the case at bar, and it was to clear this up and settle beyond question the rights of the City of Monmouth over the highway in question that the act was passed. As a matter of law the act was unnecessary and gave the city no additional authority, as that granted by the Charter of 1899 was plenary.

These considerations render it unnecessary to discuss the other points argued by counsel.

The decree of the Circuit Court is affirmed.

AFFIRMED.

BURNETT, BEAN and JOHNS, JJ., concur.

Argued January 29, affirmed March 9, 1920.

MERCHANT v. MARSHFIELD TRADING CO.

(188 Pac. 174.)

Deeds—Deed Between Partners Conveying All of Government Lot by Number as Originally Surveyed.

1. Deed from one partner to another, describing one of the tracts conveyed as "lot 2 in section 26, township 25 south, range 13 west, Willamette meridian. * * Also all the following described tide-land in said county of Coos, State of Oregon, being the tide-lands owned by [the partners]. The tide-lands lying east of and adjoining lot 2, section 26, township 25 south, range 13, W., W. M."—conveyed the whole of lot 2 as originally surveyed and platted by the government, without regard as to whether the lands were uplands or tide-lands, or whether the grantor partner obtained his interest through patent from the government to the remote predecessor of the partners, or through purchase from the state by the partners.

Deeds—Evidence—Conveyance of Property by Name Known to and Used by Parties Valid.

2. If parties to a conveyance knew the particular tract by a name which they had adopted for it, the deed to the property by

such names was a good description, and extrinsic evidence may be invoked to show that they had so known and designated the property among themselves, and therefore intended to convey it by the name.

From Coos: GEORGE F. SKIPWORTH, Judge.

Department 2.

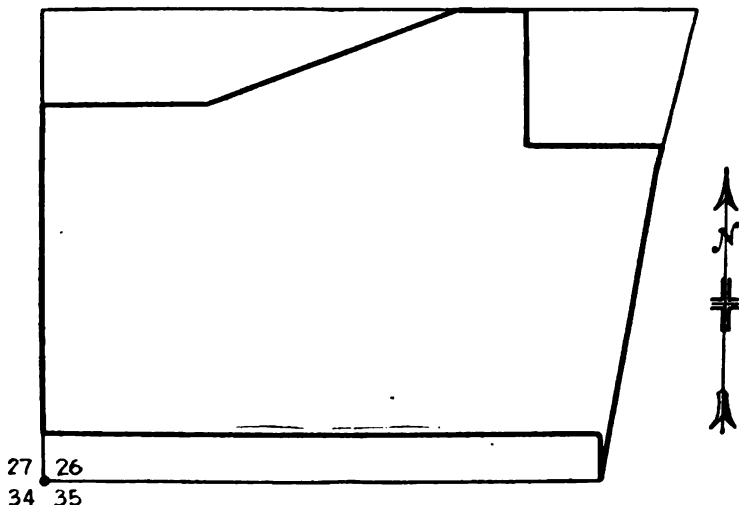
This is a suit to quiet title to a large number of lots in E. B. Dean & Company's Addition to the town of Marshfield. These lots were within the exterior boundaries of lot 2 of section 26 of the particular township, as described in the original government surveys and plats. This lot 2 was patented by the government to A. M. Simpson in 1864, and was transferred by mesne conveyances to E. B. Dean and David Wilcox, who, in 1873, conveyed a one-eighth interest in the same to C. H. Merchant, the ancestor of the plaintiffs.

At this time Dean, Wilcox and C. H. Merchant seem to have been partners in the mercantile and lumbering business at Marshfield, although there seems to be no record of any formal articles of copartnership until the year 1889. This partnership of E. B. Dean & Co., including Merchant, continued to November 1, 1892, when it was dissolved by mutual consent, Merchant retiring from the firm.

In 1877, and while the partnership with Merchant was still continuing, the partners seem to have concluded that a large portion of the land included within the exterior boundaries of lot 2, were really tide-lands, belonging to the state, and they made surveys and application to purchase the same from the state.

The accompanying diagram will show the relations of the land purchased from the state to the boundaries of lot 2, as surveyed by the government. The light line corresponds with the line of lot 2, as surveyed by

the government, and the heavy line inside bounds the portion that was purchased by Dean, Wilcox and Merchant from the state.



The plant of the partnership, including the mills and store, was located either on the land thus purchased from the state, or on other tide-lands lying in front of and immediately adjoining the same.

On October 31, 1892, the day before the dissolution of the partnership, and apparently as part of the same transaction, Merchant executed a deed to E. B. Dean, by which he transferred his interest in about 25 or 30 large tracts of land in the vicinity of the then plant at Marshfield, which deed, among the rest, described the following tract:

“Lot 2 in Section 26, Township 25 South, Range 13 West, Willamette Meridian. * * Also all the following described tide-land in said county of Coos, state of Oregon, being the tide-lands owned by E. B. Dean, David Wilcox and Charles H. Merchant. The tide lands lying east of and adjoining Lot 2, Sec. 26, T. 25 S. R. 13 W., W. M.”

And then follows a description of other tracts of tide-lands. But the tract, which had been purchased from the state as tide-land within lot 2, was not separately or further described.

It is claimed by the plaintiffs that this deed did not convey the part of lot 2 purchased from the state as tide-land, but only conveyed the upland in said lot. On the other hand, it is claimed by the defendant that by the description of lot 2 in the deed, Merchant conveyed everything within the boundaries of lot 2, as surveyed and platted by the government.

AFFIRMED.

For appellants there was a brief over the names of *Mr. W. T. Slater* and *Messrs. Stoll & Hodge*, with an oral argument by *Mr. Slater*.

For respondent there was a brief over the names of *Mr. John D. Goss*, *Mr. John C. Kendall* and *Mr. Herbert S. Murphy*, with an oral argument by *Mr. Goss*.

BENNETT, J.—Very able, learned and extended arguments have been presented upon both sides, as to whether these lands in question were actually tide-lands, and as to whether the title of the defendant, if otherwise imperfect, has or has not been rendered complete by adverse possession and the statute of limitations. As we view the case, however, it is not necessary to consider these questions.

1. Assuming, without deciding, that the lands in question were tide-lands and did not pass by the patent from the government to Simpson, and assuming in the same way, that the possession by the defendant had not ripened into an adverse title, we still think it apparent that the deed from Merchant to Dean was in-

tended to and did convey the whole of lot 2, as it was originally surveyed and platted by the government, without regard to whether the lands were uplands or tide-lands, and without regard to whether Merchant obtained his interest through the patent from the government to Simpson or through the purchase from the state by the individual partners.

It is assumed in the learned brief of counsel for the appellants that the term "lot 2 in section 26" has a fixed and definite meaning which does not admit of any ambiguity, and which would only include the upland actually conveyed by the patent from the government to Simpson. But we do not think that the description of a government lot marked off by its surveys has such a fixed and definite meaning. It is an arbitrary term, coined by the government to describe and include the particular tract of land designated by its survey.

In this case, if we assume that a portion of the lot was tide-land, the government could not by its patent, and did not, convey all the land described by it in its survey as lot 2, because a part of that land belonged to the state, and the government had no title to convey. Under such circumstances the parties might, by their conveyance of lot 2, intend to follow the implied limitations of their patent, and to convey only that portion of lot 2, which was upland, and which, therefore, had been obtained from the government under the government patent. Or they might, and more probably did, intend to adopt and follow the government survey, and to convey everything owned by the grantor within the limits of the platted survey of that lot. In this case it seems reasonably apparent from the evidence, that the parties in their talk about lot 2, and in their dealings in relation thereto, had adopted the govern-

ment survey as a designation of the entire fifty-one acres covered by that survey, and that they conveyed it with reference to that designation.

The testimony shows that Merchant had frequently designated and referred to these lots and blocks in question in Dean's Second Addition, as a part of lot 2.

Mr. Pheland, who came up as manager for E. B. Dean & Co. in 1893, immediately after C. H. Merchant withdrew from the firm, testified—

That when Merchant showed him around over the property he had transferred to E. B. Dean & Co., "he showed me the lots herein what they called lot 2. There was about two hundred lots that wasn't sold at that time in lot 2 that belonged to Dean & Co.—he had sold his interest in that to Dean & Co. * * Yes, I talked with him about these lots and about their value.

"Q. About these lots—you say he showed you lot 2? By lot 2, you mean government lot 2?

"A. Yes. That is what he *generally called it*. In speaking of it him and Mr. Dean *called it lot 2*, but it was Dean & Company's Second Addition. We are in it now."

All of this is undisputed. And if it is true—and we have no reason to assume that it is not—it follows that both Merchant and Dean were in the habit of designating the whole of the property included in the government survey as "lot 2." This conclusion is strengthened by the terms of the deed from Dean & Wilcox to Merchant of this same property in 1873, in which the land is described as "lot 2 of section 26, *containing 51 acres of land.*"

That they must have adopted this designation of the entire fifty-one acres is further shown by the clause in the deed from Merchant to Dean, in which, after

mentioning lot 2 in section 26, the deed proceeds: "The tide-lands lying east of and adjoining lot 2 in section 26." Now if they did not mean lot 2 in section 26, as surveyed by the government, but meant only the upland, as claimed by the appellants, this last description of the "tide-lands lying east of and adjoining lot 2," would be practically meaningless, for there are no tide-lands adjoining any part of the *uplands* of lot 2 on the east, except a very small piece adjoining the northeast corner, and the whole tract of tide-lands lying in front of the tide-lands in dispute would not have been conveyed at all, although the body of the plant of the partnership was on tide-lands in front of these particular tide-lands in question here.

2. It is well settled by the authorities that if the parties who were conveying had known a particular tract by a name which they had adopted for that tract, a deed to the property by that name is a good description, and extraneous evidence may be invoked to show the fact that they had so known and designated the property among themselves, and, therefore, that they intended to convey the property in question by that name.

In Wharton on Evidence, Volume 2, Section 943, it is said:

"So again, to take a familiar illustration, if an estate be conveyed by the designation of Black-acre, parol evidence is receivable to show what property is known by that name."

In *Baucum v. George*, 65 Ala. 259, 267, the only description of the premises found in the deed was the "Douglas Gold Mine," and it was proposed by parol evidence to identify the lands in controversy as known by that designation. The court admitted the evidence, saying:

“Ambiguous descriptions of land in conveyances are open to explanation by parol. The familiar illustration given in the books is, when an estate is granted by the designation of Black-acre, parol evidence is received to identify the premises known by that name.”

In our own court in *Bogard v. Barhan*, 52 Or. 121 (96 Pac. 673, 132 Am. St. Rep. 676), it is said:

“That is certain which can be made certain. If the land has, as a tract or lot, acquired a name to distinguish it and by which it is known, the same may be conveyed without reference to its boundaries.”

So in *St. Dennis v. Harras*, 55 Or. 379 (105 Pac. 246, 106 Pac. 789), it is said:

“If the tract or parcel of land has a name to distinguish it, and by which it is known, it may be conveyed by that name without making reference to boundaries.”

So in this case, if Dean and Merchant had designated the fifty-one acres covered by the government survey as lot No. 2, and had known it by that name among themselves, and caused it to be described in the deed by that name, the description was sufficient.

Besides this, it seems to us that the conduct of the parties shows that this is the true construction of the deed. The overwhelming weight of the evidence is that after the conveyance to Dean, Merchant never claimed this property, and always treated it as the property of E. B. Dean & Co. Pheland says he never claimed it, but always referred to it as the property of E. B. Dean & Co.

Squire, who was for a number of years bookkeeper for E. B. Dean & Co., testified to the same thing. The sons of Merchant, who are plaintiffs herein, testified that they never heard their father make any claim to the property, and the only evidence to the contrary was the testimony of one Ayer, that Merchant made

some sort of a claim upon the land in connection with permitting Ayer to have a boat-landing upon the premises.

When Merchant was receiver for E. B. Dean & Co. he deeded a number of the lots, which were part of the land purchased from the state, to different parties as receiver of that company, and apparently never claimed any interest whatever in the receipts.

The circumstances are overwhelming in their weight, and it seems to us the decree of the lower court should be affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., -concur.

Argued January 28, affirmed March 9, 1920.

**CITY OF PENDLETON, FOR USE AND BENEFIT OF
OREGON LUMBER YARD, v. JEFFERY &
BUFTON ET AL.**

(188 Pac. 176.)

Sales—Material to be Paid for on Delivery.

1. In absence of allegation and proof of a contrary stipulation, it will be assumed that building material was to be paid for on delivery.

Municipal Corporations—Contractor Required to "Promptly" Make Payments to Pay Bills at Maturity.

2. Under Section 6266, L. O. L., requiring contractors on public contracts to "promptly" pay materialmen, a contractor's surety was obligated to pay such bills at their maturity.

Principal and Surety—Contractor's Surety Liable for Interest.

3. Under Section 6266, L. O. L., requiring contractors to promptly pay materialmen, and Section 6028, fixing the interest rate upon balances due on matured accounts, a contractor's surety is liable for interest on amounts due the materialmen between the date material was furnished and the date the materialmen and contractor agreed upon the balance due.

Municipal Corporations—Action for Account Stated may be Maintained Against Contractor's Surety.

4. Under Section 6266, L. O. L., giving a municipality a right of action for the benefit of a materialman against a contractor and his sureties, the fact that complaint alleges an account stated between the contractor and materialman is not objectionable, where such account was merely an agreement as to the amount due for materials.

Municipal Corporations—Materialman's Efforts to Collect Debt did not Release Contractor's Surety.

5. A materialman's efforts to collect the amount due from the contractor by prosecuting the contractor's claim against the owner, foreclosing a mortgage assigned to it by the contractor, etc., held not to release the contractors's surety from liability under Section 6266, L. O. L., for the remaining balance, where it had been kept informed of the materialman's efforts to collect the debt.

From Multnomah: GEORGE G. BINGHAM, Judge.

· Department 2.

This is an action brought under Section 6266, L. O. L., by the City of Pendleton, a municipal corporation, for the use and benefit of the Oregon Lumber Yard, an Oregon corporation, with principal office at Pendleton, against Jeffery & Bufton, another Oregon corporation, with principal office in Portland, and the American Surety Company of New York, a New York corporation, with an office in the City of Portland, and duly licensed under the laws of Oregon to become surety on bonds and undertakings in this state. On September 11, 1912, the defendant Jeffery & Bufton entered into a contract with the water commission of the City of Pendleton to furnish the necessary labor and materials for distributing reservoirs for that municipality in accord with certain plans and specifications. To insure the performance of the contract and under the provisions of Section 6266, L. O. L., Jeffery & Bufton, as principal, and the Surety Company for a valuable consideration to it paid, executed to the water commission of Pendleton a penal bond in the sum of \$7,500, conditioned as follows:

"If the said Jeffery and Bufton shall well and faithfully perform all of the provisions and conditions by them to be performed, in the manner and within the time set forth, and shall pay all laborers, mechanics, subcontractors and materialmen and all persons who shall supply said principal, or any subcontractor with provisions or supplies for the carrying out of said work, all just debts, dues and demands in the performance of said work, * * then this obligation shall be void, but otherwise to remain in full force and effect."

Copies of the plans and specifications, contracts and bonds are attached to and made a part of the complaint. Pursuant thereto, Jeffery & Bufton commenced work under the contract and between September 23, 1913, and March 7, 1914, the Oregon Lumber Yard furnished and delivered to that defendant, at its special instance and request, certain lumber, sand, cement, gravel and other materials to be used, and which were actually used in the construction of the reservoirs. On August 12, 1914, the parties had an accounting thereof between themselves, in which it was found and agreed that on account thereof there was a balance of \$3,675.71 due and owing from Jeffery & Bufton to the Oregon Lumber Yard. It is then alleged that no part thereof has been paid, except the sum of \$1,120 on September 13, 1915, and that, including accrued interest, there is now due and owing the sum of \$2,725.93 with interest thereon from the date last mentioned at the rate of 6 per cent per annum.

Like allegations are made as to a second cause of action upon another contract for the construction of a waterworks conduit, upon which a bond was furnished in the sum of \$6,000. As to that contract it is then alleged that on August 12, 1914, there was another accounting, in which it was ascertained and agreed

that there was due and owing from Jeffery & Bufton to the Oregon Lumber Yard a balance of \$6,771.64, upon which \$5,985.85 was paid September 13, 1915, and that with accrued interest there was due and owing \$1,200.26, with interest at 6 per cent per annum from September 13, 1915, for which the plaintiff prayed judgment against the defendants.

It is charged in the complaint that the Surety Company knew and approved of the settlements and accounting; that prior to the action, the Oregon Lumber Yard filed its claim with the Surety Company, and that the latter has failed, neglected and refused to pay any part thereof.

For answer to each cause of action the Surety Company admits the existence of the corporations as alleged, and the execution of the bonds under the terms and provisions of Section 6266, L. O. L., but denies knowledge of any accounting or agreement as to the balance due on the contract or the filing of any claim or demand for payment. For further and separate defense this defendant alleges that on August 12, 1914, Jeffery & Bufton executed three certain promissory notes to the Oregon Lumber Yard, aggregating \$10,-407.35, and a warranty deed of lots 9, 10 and 12 in block 4 of Murphy's Addition to East Portland, to one A. H. Cox, together with an absolute assignment of all its claims against the City of Pendleton; that such notes, deed and assignment were executed, taken and accepted in full payment and satisfaction of the claims and demands of the Oregon Lumber Yard against Jeffery & Bufton; that the Surety Company had no knowledge or information of such transactions, and did not assent to or take any part therein; and that such acts and facts constitute a novation and operate as a release and discharge of the Surety Company from

all liability upon its bonds. The Surety Company further pleads the institution of a suit against Jeffery & Bufton to foreclose the deed as a mortgage, the resulting decree therefor, and the advertising of the property for sale under the decree.

The plaintiff denies all the material allegations of the further and separate answer, and in replying alleges that it was understood and agreed that the notes referred to should be held by Oregon Lumber Yard as security for any amount due it from Jeffery & Bufton; that any proceeds should be credited thereon, and in the event that such notes were paid they were to be canceled and returned to the maker; that such deed and notes were to be deemed as additional security; and that prior to the commencement of the suit the Oregon Lumber Yard tendered them to the Surety Company and demanded payment of the amounts due by reason of such transactions; and that the action was commenced against the City of Pendleton on the assigned claims, which was afterwards settled and the proceeds applied *pro tanto* on claims against Jeffery & Bufton. The plaintiff further avers that in substance all of such suits, proceedings and actions were had and taken for the use and benefit of Jeffery & Bufton and the Surety Company, with the full knowledge, consent and approval of the latter and for its protection.

The trial court made findings of fact supporting the allegations of the complaint and plaintiff's further and separate reply, and found that there was due and owing from the defendants to the plaintiff \$4,022.29, with interest from September 13, 1915, at 6 per cent per annum, for which amount a decree was rendered. The Surety Company alone appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. John K. Kollock*.

For respondent there was a brief with oral arguments by *Mr. William D. Fenton* and *Mr. Harry L. Rafferty*.

JOHNS, J.—While Section 6266, L. O. L., provides that a bond shall be given to the effect that the contractor “shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contracts,” it will be noted that in the instant case the bond provides that the contractor—

“Shall pay all laborers, mechanics, subcontractors and materialmen and all persons who shall supply said principal, or any subcontractor with provisions or supplies for the carrying out of said work, all just debts, dues and demands in the performance of said work.”

While that is true, the answer admits the bond as alleged, and that it was executed “in compliance with Section 6266, L. O. L., for the purpose of protecting all materialmen, subcontractors, laborers and mechanics performing labor and furnishing material in and on account of said work,” and that it was executed for a valuable consideration.

The testimony is conclusive—in fact, it is not disputed—that the Oregon Lumber Yard did furnish and deliver to Jeffery & Bufton supplies and material to be used, and which were used, in the construction of the distributing reservoirs and conduits under its contract with the City of Pendleton, and that Jeffery & Bufton promised and agreed to pay the Oregon Lumber Yard the full amount of its claims, including the interest. The testimony is also conclusive that on August 12, 1914, there was a settlement between the

Oregon Lumber Yard and Jeffery & Bufton, by which it was then agreed that there was due and owing from Jeffery & Bufton to the Oregon Lumber Yard the sum of \$6,771.64 upon one contract and \$3,675.51 upon the other, for and on account of materials and supplies which were used by Jeffery & Bufton in its contract with the City of Pendleton. It is claimed by the appellant, and the testimony tends to show, that the settlement includes an item of \$154 as interest, and it is vigorously contended that the plaintiff is not entitled to recover any interest from the defendant Surety Company prior to the rendition of the decree—citing and relying on the case of *Sargent v. American Bank & Trust Co.*, 80 Or. 16, at page 41 (156 Pac. 431).

1, 2. Section 6266, under which the action was brought, provides that the "contractor shall promptly make payments to all persons," etc., and it appears from the evidence that the material was delivered continuously between the 24th of September, 1913, and the eighth day of March, 1914. In the absence of allegation and proof we must assume that as between purchaser and seller the material was to be paid for upon its delivery, and as between the Oregon Lumber Yard and the American Surety Company the statute provides that the "contractors shall promptly make payments."

In Words & Phrases, Vol. 6, page 5684, it is said the word "promptly" as used in a lease providing that the taxes should be paid was meant to emphasize that the taxes would be paid as soon as they became due. Certain it is that the word "promptly" means something more definite and covers a shorter time than a reasonable time. "Promptly" is defined as "quickly" or "expeditiously," so that an instruction that a city was chargeable with the duty to promptly repair an

alleged defect in a street is erroneous, as the city is responsible only for a reasonable diligence, and "reasonable diligence" is not equivalent to "promptly." To guarantee "full and prompt payment" would mean, in the case of a note payable at some bank, the time it was actually to be paid in full at maturity.

We hold that Section 6266 should be construed to mean that such surety should pay all bills for lumber and material at their maturity. There is no dispute as to the amount of the purchase price of the materials, or as to any of the payments, and the statutory bond provides that all claims for labor and material shall be promptly paid. The purchases commenced on September 24, 1913, and were completed on March 8, 1914. The settlement between the Oregon Lumber Yard and Jeffery & Bufton was made on August 12, 1914. More than five months intervened between the date of the last delivery and the settlement, and Jeffery & Bufton then agreed upon the amount which it owed the Oregon Lumber Yard. There is no claim or pretense that it was not a *bona fide* settlement.

3. Section 6028, L. O. L., provides that—

"The rate of interest in this state shall be 6 per cent per annum * * on money due upon the settlement of matured accounts from the day the balance is ascertained."

It was a matured account, and as between Jeffery & Bufton and the Oregon Lumber Yard the balance was ascertained on the twelfth day of August, 1914. It involved the mutual dealings of many thousands of dollars and covered a period of about eighteen months, during all of which time the Surety Company was in touch with the situation, and was kept fully advised of actual conditions, and never made any protest or objection until its answer was filed. The case was

tried by the court without a jury, which found as a fact that the settlement and accounting—

“Was known to the managing officer of the defendant, American Surety Co. of New York, very shortly after August 12, 1914, and was not objected to by such managing officer or such company.”

While it is not clear or positive, there is evidence to support that finding, and it is as binding upon this court as the verdict of a jury. There is a marked difference between the facts in this case and that of *Sargent v. American Bank & Trust Co.*, 80 Or. 16 (154 Pac. 759, 156 Pac. 431), and for such reason that case is not in point.

4. Appellant also contends that the complaint states a cause of action on an account stated, and that the plaintiff cannot recover in that form of an action on a bond executed pursuant to Section 6266. That section provides that the plaintiff shall have a right of action for the use and benefit of the Oregon Lumber Yard “against said contractor and sureties, and to prosecute the same to final judgment and execution.” It does not specify or define the form or what kind of an action shall be brought. As we construe the complaint, the plaintiff seeks to recover the purchase price of materials which were furnished and delivered and used in the construction of the waterworks system at Pendleton, and while it is true that the complaint alleges that there was a settlement and an agreement as to the amount which was due and owing the Oregon Lumber Yard on account of such purchases, such allegations are statements of facts tending to show that the claims are just and founded upon an agreement between the parties.

5. It is further contended that the Oregon Lumber Yard was vested with full control of the litigation

against the City of Pendleton, and that the assignment of the claims operated as a bar to any action by Oregon Lumber Yard against Jeffery & Bufton, and that by reason thereof the American Surety Company was released, and that the contract of May 1, 1915, substituting new promissory notes was a novation. Exclusive of the writings the testimony is very meager. The trial court found that the suit to foreclose the mortgage "was instituted and prosecuted to a decree with the full knowledge and consent of the defendant, the American Surety Co. of New York," and finding No. 7 is as follows:

"Prior to the twelfth day of August, 1914, the Oregon Lumber Yard furnished to the defendant the American Surety Co. of New York a statement of its account with said Jeffery & Bufton for materials furnished for such reservoirs and conduit, and from that time until the commencement of this action it counseled with and it advised with the American Surety Co. of New York concerning the various means that might be taken to obtain payment of the amount due the Oregon Lumber Yard, and the American Surety Co. of New York did not object or protest against any of the means used by the Oregon Lumber Yard to secure the amount of money due to it, but, on the contrary, advised the Oregon Lumber Yard to continue to use its best endeavors to collect from said Jeffery & Bufton. The defendant American Surety Co. of New York has not been injured or prejudiced in any manner by the various things that have been done by the Oregon Lumber Yard in its endeavors to collect the money so due to it, but, on the contrary, it has been directly benefited thereby."

The trial court also found that the action of the Oregon Lumber Yard against the City of Pendleton was brought for the use and benefit of Jeffery & Bufton, and was at all times under its direction and control, and was compromised and settled by and with its ad-

vice, and that the moneys received therefrom were credited on the balance due the Oregon Lumber Yard on or before September 13, 1915.

We are convinced that it was never the purpose or intent of the Oregon Lumber Yard to release or discharge the American Surety Company from its liability on the bonds; that the Surety Company was at all times in touch with the situation and the actual facts; that the Oregon Lumber Yard was acting in good faith to obtain from Jeffery & Bufton all of the money which it could obtain upon the payment of its claim; and that as a net result of the assignment of the claims against the City of Pendleton, on September 13, 1915, there was collected and credited on the account against Jeffery & Bufton \$1,120 upon one contract and \$5,985.85 upon the other, and the gross claim was reduced \$7,105.85, and in legal effect this was a reduction of the claim against the Surety Company. That amount was the net proceeds found due and owing Jeffery & Bufton, in a settlement between all the parties after the suit was brought, on its claim against the city. There is no claim or pretense that there was any fraud in the settlement, or that it was not for the best interests of all parties concerned. In *Black v. Sippy*, 15 Or. 575 (16 Pac. 419), this court through Chief Justice LORD said:

“Nothing is better settled than that accepting a note is not payment of an account, nor is accepting one note in renewal of another payment of the old note, unless there is an agreement that the note should be accepted in payment.”

In *Rimer v. Southwestern Surety Ins. Co.*, 85 Or. 293, 299 (165 Pac. 684, 686), it is said:

“The general rule adopted in most jurisdictions, and followed by this court, is that the delivery and acceptance of a note does not extinguish the original indebted-

edness, unless the parties agreed to give and accept the note as absolute payment."

In the last opinion all of the Oregon decisions on that question are collated and cited. In the instant case there is no evidence that the promissory notes were taken or intended to be taken in payment or satisfaction of the primary debt.

The taking of the collateral security did not release the Surety Company. As a matter of fact it was taken for its use and benefit. In so far as the claim of the Oregon Lumber Yard against Jeffery & Bufton was paid or secured, it operated as a reduction *pro tanto* or as security of its claim against the Surety Company.

The obligation of the Surety Company was to promptly pay for the material which was sold and delivered. This was not done. The Oregon Lumber Yard, in good faith and so far as it was possible, undertook to and did reduce its claim against Jeffery & Bufton, and by reason thereof minimized the amount of its demand against the Surety Company, which knew and was fully advised as to what was done and received the full benefit of its efforts. Exclusive of interest there is no claim or *prétense* that the claim of the Oregon Lumber Yard is not a just debt, or that the amount found due or owing at the time of the settlement was not a just claim. As stated, this is an action at law, tried by the court without a jury, which made findings of fact sustaining the allegations which were made in the complaint and the further and separate reply.

After careful examination of all the questions ably discussed by counsel, we are convinced that the judgment of the lower court was right, and should be affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued February 3, affirmed March 9, 1920.

LOVEJOY v. PORTLAND.

(188 Pac. 207.)

Statutes—Constitutional Provision Demanding That There be but One Subject to be Liberally Construed.

1. While Article IV, Section 20, of the Constitution, demanding that every act embrace but one subject, and the matters properly connected therewith, which subject shall be expressed in the title, is mandatory, and failure to comply with it renders a statute void, yet it should be reasonably and liberally construed to sustain legislation not within the mischief aimed against.

[As to constitutional requirement as to form of enacting clause of statute as directory or mandatory, see note in 14 Ann. Cas. 813.]

Constitutional Law—Statute Presumed to be Constitutional and to Embrace Only One Subject.

2. Every legislative act is presumed to be constitutional, and the conflict between a statute and the Constitution should be palpable before a legislative enactment should be held to be void on the ground that it embraces more than one subject or because the subject is not sufficiently expressed in the title.

Statutes—"Subject," in Constitutional Provision Providing That Subject be Expressed in Title, Given Broad Meaning.

3. The term "subject," in Article IV, Section 20, of the Constitution, demanding that every act which embraces but one subject, and matters properly connected therewith, which subject shall be expressed in the title, is to be given a broad and extensive meaning so as to allow the legislature full scope to include in one act all matters having a logical or natural connection, and the subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject and not several.

[As to construction of constitutional provisions relative to titles of statutes, see notes in 1 Ann. Cas. 584; Ann. Cas. 1915A, 79.]

Statutes—Provision in General Statutes Relating to Insurance Prohibiting Cities from Imposing License Taxes Properly Connected With Subject of Enactment.

4. The provision within Laws of 1917, page 321, Section 3d, subdivision 6, which prohibits cities and towns from imposing additional license taxes, is properly connected with the subject of such chapter, which generally relates to the regulation and supervision of insurance, and the title is sufficient to include such provision.

Municipal Corporations—Statute Prohibiting a Municipal Corporation from Imposing License Taxes on Insurance Agents No Invasion of Field of Municipal Legislation.

5. Laws of 1917, page 321, Section 3d, subdivision 6, prohibiting cities from imposing a license tax on insurance agents, does not contravene Article XI, Section 2, of the Constitution, prohibiting the legislature from entering into the field of municipal legislation.

Municipal Corporations—Legislature not Prohibited by Constitution from Enacting General Laws Concerning Municipal Corporations.

6. The legislature is not prohibited by Article XI, Section 2, of the Constitution, from enacting general laws concerning cities and towns.

Courts—Part of Opinion Relating to Power of Legislature to Enact General Laws Concerning Municipal Corporations not Obiter Dictum.

7. Where, on appeal, the court had for consideration, first, whether a port was a "municipality" within the purview of Article XI, Section 2, of the Constitution, and, second, whether that section prohibited the legislature from enacting general laws affecting corporate bodies embraced within it, the decision of the first question in the negative did not render a decision in the same opinion as to the second question *obiter dictum*.

From Multnomah: JOHN P. KAVANAUGH, Judge.

In Banc.

This is a suit brought by George A. Lovejoy to enjoin the City of Portland from compelling him to pay a license fee for the right to act as an insurance agent in Portland. The city demurred to the complaint; the court overruled the demurrer, and upon the refusal of the city to plead further a decree was entered for the plaintiff, and the city appealed. The demurrer assumes that the allegations of the complaint are true.

The controversy arises out of a conflict between a state statute and a city ordinance, and on that account it will be necessary to direct attention first to the state statute and then to the city legislation. In 1917 the legislative assembly enacted a measure entitled "An act to provide for the regulation and supervision of insurance in the State of Oregon, other than State Industrial Accident Insurance, and repealing" a considerable number of sections of the Code as well as

certain laws adopted in 1911 and 1915. This enactment is otherwise known as Chapter 203, Laws of 1917, and it thoroughly covers the field of insurance regulation and supervision. It regulates the conditions under which business may be commenced and the manner in which it may be conducted. It regulates the organization of the insurance department, and it prescribes the jurisdiction and defines the powers of the state insurance commissioner. It deals with the mode of organizing local companies, the admission of foreign companies, the nature of the investments of local and foreign companies, and examinations and reports of companies. It contains various provisions to insure the solvency of insurance companies, and it affords means for excluding companies of impaired or doubtful solvency. It prescribes the qualifications of agents and provides for licensing them and for revoking the licenses of agents who violate the law or are otherwise unfit. It specifies the kinds of insurance which various companies may write, and it designates the form and manner in which policies may be written. It contains rules designed to secure equal rights and opportunities between insurance companies, to prevent discrimination in rates, and to compel insurers to treat all insured alike. It furnishes safeguards against excessive or unjust premium rates, and it contains prohibitions against combinations between companies or agents for any purpose detrimental to the public welfare. In a word, the legislature has attempted to place the insurance business completely under the supervision of the state, and to accomplish the purpose the state has adopted an elaborate and comprehensive statute covering the whole field of insurance regulation and supervision.

This statute imposes a tax upon the business done by a company, and it prescribes license fees for companies and agents. Section 3d, subdivision 2, requires a foreign company to pay to the insurance commissioner an annual tax of $2\frac{1}{2}$ per cent of the net premiums. Subdivision 5 of the same section prescribes fees to be paid by companies, including an annual license fee of \$100 for life insurance companies and a license fee of \$2 for each of its agents. Section 3e imposes reciprocal obligations upon the companies of other states in which the taxes, license fees, obligations, and prohibitions, in the aggregate exceed those imposed by this state. Section 3f provides that the fees, licenses, taxes, fines, and penalties paid to the insurance commissioner shall be turned over to the state treasurer and so far as necessary shall be available from the general fund for the payment of the expenses of the insurance department.

In Section 3d, subdivision 6, it is said:

“The taxes, fees and charges as herein and elsewhere provided for in the ‘Insurance Law’ shall be in lieu of all other taxes, licenses, fees and charges of every kind and character by the state or any city, town, county or other political subdivision thereof, except taxes on real and personal property located in this state, which may be required of companies or their agents for the privilege of transacting insurance business.”

On June 6, 1917, the council of Portland passed an ordinance numbered 32,925 and entitled “An ordinance on the regulation of private business, including licenses, and declaring an emergency.” This ordinance makes it unlawful for any person to engage in any business, profession, trade, or calling, specified in the ordinance unless such person obtains an appropriate license from the city. Insurance agents are among those included

in the ordinance, for it is provided that every agent of any insurance, bonding, surety, indemnity, or guaranty company shall pay for each company represented by him, and that any company doing business directly shall pay to the City of Portland a quarterly license of \$10, payable January 1, April 1, July 1, and October 1 of each year in advance. The ordinance declares that a violation of any of its provisions shall be punished by a fine or imprisonment or both. Ordinance No. 32,925 is, so far as insurance agents are concerned, in substance the same as a prior ordinance which had been adopted before the enactment of Chapter 203, Laws of 1917, but this prior ordinance was not repealed or modified by the city until Ordinance No. 32,925 was adopted.

The city is authorized by its charter to impose licenses and taxes. The charter (Section 73, subd. 21) granted by the legislature in 1903 (Sp. Laws 1903, c. 1) empowered the council to "grant licenses, with the object of raising revenue or of regulation, or both, for any and all lawful acts, things, or purposes, and to fix, by ordinance, the amount to be paid therefor, and to provide for the revoking of the same. * * "

When the legal voters of Portland, in the exercise of the power of the initiative, re-framed the city charter in 1913, they inserted in the re-framed charter the following provision:

"The specific powers granted to the city under Sections 73 and 73½ of the Charter of 1913 shall continue to be exercised by the Council as a part of the general grant made by the Charter."

The Guarantee Fund Life Association, hereinafter called the company, is a life insurance corporation organized under the laws of Nebraska, and it has fully complied with the laws of Oregon relating to the ad-

mission of foreign insurance companies in this state. This company has been legally licensed and permitted by the state insurance commissioner to transact business here, and it is engaged in transacting life insurance business throughout this state. The company has paid to the state insurance commissioner all licenses, fees, and taxes required by this state, including the sum of \$86.18, which is the portion of the annual license fee required for the privilege of transacting business from May 21, 1917, to April 1, 1918. The plaintiff is authorized by the company "to act as its agent at Portland," and the company has paid to the state insurance commissioner the sum of \$2, "being the fee required by the laws of the State of Oregon to be paid for the licensing of this plaintiff as its agent for the period of time from May 21, 1917, to April 1, 1918," and the plaintiff was licensed and authorized by the insurance commissioner to act as an agent of the company at Portland until April 1, 1918.

Notwithstanding the terms of Section 3d, subd. 6, of Chapter 203, Laws of 1917, the city claims that Ordinance No. 32,925 was valid and enforceable and demanded that the plaintiff "as agent at Portland" of the company pay to the city the sum of \$10 "as a quarterly license fee under the ordinance" for the quarter beginning July 1, 1917; and the city threatened, unless the plaintiff paid the demanded fee, to arrest and fine and imprison him. On July 7, 1917, the plaintiff, for himself and in behalf of about two hundred other insurance agents in Portland similarly situated, began this suit for the purpose of enjoining the city from enforcing the ordinance.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Walter P. La Roche*, City Attorney, and *Mr. L. E. Latourette*, Deputy City Attorney.

For respondent there was a brief over the names of *Messrs. Veazie, McCourt & Veazie*, and *Mr. Lionel C. Mackay*, with an oral argument by *Mr. J. C. Veazie*.

HARRIS, J.—1, 2. Like most of the State Constitutions, our organic law commands that—

“Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title”: Article IV, Section 20.

The defendant contends that the title of Chapter 203, Laws of 1917, is not sufficient, within the meaning of Article IV, Section 20, of the state Constitution, to include and sustain subdivision 6 of Section 3d of the act. This section of the Constitution was designed to do away with the several abuses, among which was the practice of inserting in one bill two or more unrelated provisions so that those favoring one provision could be compelled, in order to secure its adoption, to combine with those favoring another provision, and by this process of log-rolling the adoption of both provisions could be accomplished, when neither, if standing alone, could succeed on its own merits. Another abuse which developed in legislative bodies was the practice of concealing from the members of the legislature the true nature of the proposed law by giving it a false and misleading title, and to prevent surreptitious legislation in this manner is one of the objects of the Constitution. These and similar abuses inspired the adoption of Article IV, Section 20: *Northern Counties Trust v. Sears*, 30 Or. 388, 400 (41 Pac. 931, 35 L. R. A. 188); *Moore-Mansfield Construction Co. v. Indianapolis R. Co.*, 179 Ind. 356 (101 N. E. 296, Ann. Cas. 1915D, 917, 44 L. R. A. (N. S.) 816); *Johnson v. Harrison*, 47 Minn. 575 (50 N. W. 923, 28 Am. St. Rep. 382); *County Commissioners v. Pocomoke Bridge Co.*, 109

Md. 1 (71 Atl. 462, 16 Ann. Cas. 874). While Article IV, Section 20, is mandatory and failure to comply with it renders a statute void, yet this section of the Constitution should be reasonably and liberally construed to sustain legislation not within the mischief aimed against: *State v. Shaw*, 22 Or. 287, 288 (29 Pac. 1028); 25 R. C. L. 85. Every legislative act is presumed to be constitutional, and the conflict between a statute and the Constitution should be palpable before the legislative enactment is held to be void on the ground that it embraces more than one subject or because the subject is not sufficiently expressed in the title: *Pacific Elevator Co. v. Portland*, 65 Or. 349, 384 (133 Pac. 72, 46 L. R. A. (N. S.) 363).

3. It is the "subject" of the act, and not "matters properly connected therewith," that must be expressed in the title, for the language of the Constitution is, "which subject shall be expressed in the title": *Eastman v. Jennings-McRae Logging Co.*, 69 Or. 1, 10 (138 Pac. 216, Ann. Cas. 1916A, 185); *Parks v. State*, 159 Ind. 211 (64 N. E. 862, 59 L. R. A. 190). The subject of the law is the matter to which the measure relates and with which it deals: 25 R. C. L. 842. The term "subject" is to be given a broad and extensive meaning so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. The subject may be as comprehensive as the legislature chooses to make it, provided it constituted, in the constitutional sense, a single subject and not several, for the Constitution does not contain any limitation on the comprehensiveness of the subject: *State v. Shaw*, 22 Or. 287 (29 Pac. 1028).

The word "subject" includes the chief thing to which the statute relates, and the words "matters properly connected therewith" include every matter germane to

and having a natural connection with the general subject of the act; or as said in *State v. Shaw*, 22 Or. 289 (29 Pac. 1029):

“If all the provisions of the law relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, they will not be held unconstitutional”: *Simon v. Northup*, 27 Or. 487 (40 Pac. 560, 30 L. R. A. 171); *Northern Counties Trust v. Sears*, 30 Or. 388 (41 Pac. 931, 35 L. R. A. 188); *Pacific Elevator Co. v. Portland*, 65 Or. 349 (133 Pac. 72, 46 L. R. A. (N. S.) 363).

4. The office of the title is to inform the members of the legislature of the subject of the proposed legislation, but the details must be found in the body of the measure. If the subject of the enactment is so expressed in the title as to give reasonable notice of the contents of the law, it is sufficient. If a measure has but one general subject which is fairly expressed in its title, it will be held to be a compliance with the Constitution. The general object and purpose of Chapter 203, Laws of 1917, is to regulate and supervise insurance, other than State Industrial Accident Insurance; and its general object is fairly stated in the title of the act. Whatever means may tend directly or indirectly to accomplish this object may properly be included in the act. The payment of license taxes is undoubtedly a means for the accomplishment of the object; and, within every rule of construction applied by the courts, the provision which prohibits cities and towns from imposing additional license taxes must be treated as properly connected with the subject of state regulation and supervision of insurance, for it is manifestly designed to aid state regulation and supervision: *State v. Shaw*, 22 Or. 287 (29 Pac. 1028); *Eastman v. Jennings-McRae Logging Co.*, 69 Or. 1, 10 (138 Pac.

216, Ann. Cas. 1916A, 185); *State v. Applegarth*, 81 Md. 293 (31 Atl. 961, 28 L. R. A. 812). The title of Chapter 203, Laws of 1917, is sufficient to include subdivision 6, Section 3d.

5, 6. The defendant argues that subdivision 6, Section 3d, is void because it contravenes Article XI, Section 2, of the state Constitution. This argument proceeds upon the theory that the Constitution confers upon cities and towns power to exercise the whole sum of municipal legislation, and at the same time prohibits the legislature from entering into the field of municipal legislation either by a special or by a general law. The defendant says that Ordinance No. 32,925 is pure municipal legislation, and that therefore the state law must give way to the city law. It is obvious that the ordinance and subdivision 6 of Section 3d of the state law are in irreconcilable conflict; both cannot stand; only one, and not both, can be supreme; one must yield to the other. Chapter 203, Laws of 1917, is not a special law applicable only to a single city, but it is a general law operating throughout the entire state; and hence whether the ordinance can survive or must succumb to the state law depends upon whether the authority of the city is superior to that of the legislature. The contention of the defendant is simply an attempt to revive the heretofore much debated but now settled question of whether or not the legislature is prohibited by Article XI, Section 2, from enacting general laws concerning cities and towns.

Article IV, Section 1a, and the amendment of Article XI, Section 2, of the state Constitution, were adopted in 1906. The language employed in these companion sections from the very beginning provoked much discussion and produced a contrariety of views among the members of the legal profession; and, indeed, as

pointed out in *State v. Port of Astoria*, 79 Or. 1, 18 (154 Pac. 399), even the courts, as evidenced by the precedents there collected and classified, during the first decade after the adoption of the amendments did not follow an unswerving course when considering the right of the legislature to enact general laws affecting the intramural powers of cities.

Although during that period there was a lack of complete harmony among the precedents, yet the most of them held in plain and unmistakable language that the legislature was not prohibited from passing general laws concerning cities and towns, while only a few of them held that the legislature was prohibited from passing general laws regulating intramural authority. Among the precedents belonging to the larger class are: *Straw v. Harris*, 54 Or. 424 (103 Pac. 777); *Kiernan v. Portland*, 57 Or. 454 (111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339); *State ex rel. v. Port of Tillamook*, 62 Or. 332 (124 Pac. 637, Ann. Cas. 1914C, 483); *Churchill v. Grants Pass*, 70 Or. 283 (141 Pac. 184); *State ex inf. v. Gilbert*, 66 Or. 434 (134 Pac. 1038); *McMinnville v. Howenstine*, 56 Or. 451 (109 Pac. 81, Ann. Cas. 1912C, 193). We cannot misunderstand the mind of the court when we read in *Straw v. Harris*:

"This [revision, amendment, or repeal of charters], under the Constitution as it now stands, may be done by the legislature through general laws only."

In *Kiernan v. Portland*, it is said:

"Under all the rules of construction, this exception [that no special laws creating or affecting the municipalities shall be enacted by the legislature] reserves to the legislative department the right, whether by the people directly through the initiative, or indirectly through the legislature, to enact general laws upon the subject, making it clear that the inhibition in the next sentence has reference to special laws."

The following excerpt is taken from the opinion in *State ex rel. v. Port of Tillamook*:

"Such municipal corporations are always subject to the control and regulation of the lawmakers of the State in the manner directed by the Constitution: *City of McMinnville v. Howenstine*, 56 Or. 451, 456 (109 Pac. 81, Ann. Cas. 1912C, 193). While these public corporations are capable of adopting and amending their charter, they still continue to be agencies of the state. A general control is left in the legislative assembly."

We quote from *Churchill v. Grants Pass*:

"This delegation of rights as to local self-government does not alter the relation of municipal corporations to the state, but leaves them, as they were before, mere agencies of the state which may by general laws control all its municipalities even to the extent of amending their charters."

The following language appears in *State ex inf. v. Gilbert*:

"The inhibition of that section [Article XI, Section 2 of the Constitution] is directed solely against action by the legislature affecting only a particular municipality, city, or town."

In *McMinnville v. Howenstine*, this court said:

"In other words, the legislative assembly, as one of the state's law-making branches, may by general laws control and regulate all of its municipalities, while the people, through the direct method provided, may enact either general or special laws for this purpose."

Although in one of these cases there is a principal and a specially concurring opinion, both of which reach the same conclusion in which the other members of the court concur, yet in not one of these cases was there a dissenting voice. In each instance all the members of the court agreed. Of the three cases classified in *State v. Port of Astoria* as belonging to the minority,

Kalich v. Knapp, 73 Or. 558 (142 Pac. 594, 145 Pac. 22, Ann. Cas. 1916E, 1051), is the one most frequently referred to and constitutes the main reliance of the defendant. In each of these cases one or more members of the court raised a dissenting voice, and in not one of them did all members of the court concur. It is a noteworthy fact that in each of the three cases listed with the minority one or more members of the court dissented, while in each of the six cases belonging to the majority all the members of the court concurred in the conclusion reached, and, with the exception of one case where two members followed a different course of reasoning, they also agreed upon the reasoning employed. In *State v. Port of Astoria* no attempt was made to determine whether Article XI, Section 2, prohibited the legislature from enacting general laws affecting cities and towns, although attention was directed to the discordancy found in the precedents.

When the case of *Rose v. Port of Portland*, 82 Or. 541 (162 Pac. 498), was presented for decision this court entered into the investigation of the questions there involved with a full realization of the discordant rulings made in prior adjudications, and with the purpose of finally and definitely settling, if possible, the controverted questions arising out of Article IV, Section 1a, and Article XI, Section 2, of the state Constitution. Every member of the court gave to every one of these questions his best thought and most deliberate judgment, with the result that upon every question discussed all the members of the court agreed not only as to the conclusions, but also as to the reasoning employed. The rule unanimously adopted in *Rose v. Port of Portland* is decisive of the question here presented, for upon the authority of that precedent the legislature

had ample power to enact Chapter 203, Laws of 1917, including subdivision 6 of Section 3d.

7. The defendant argues, however, that all that was said in *Rose v. Port of Portland* as to the power of the legislature to enact general laws concerning cities and towns was *obiter dictum*, for the reason that it was decided that a port was not a municipality within the meaning of Article XI, Section 2. Counsel for the Port of Portland contended that this section of the Constitution prohibited the legislature not only from passing special laws but also from enacting general laws concerning any "municipality, city or town"; that a port was "a municipality" within the meaning of that term as used in the second sentence of the section; and that therefore all ports, including the Port of Portland, were freed from the control of the legislature and empowered to amend their own charters or acts of incorporation. When deciding that case, this court held, it is true, that the word "municipality" as used in the second sentence of Article XI, Section 2, did not include a port; but it is also true that the court prosecuted to the very end its examination of the contention made by the Port of Portland, by assuming, for the sake of the argument, that the port was correct in its contention that it was a "municipality" within the meaning of that section of the Constitution. Proceeding on this assumption the court then answered the argument of the Port of Portland, by holding that Article XI, Section 2, did not prohibit the legislature from enacting general laws concerning any of the corporate bodies embraced by that section of the Constitution. The contention of the Port of Portland presented to the court for its consideration: First, whether a port was a "municipality" within the purview of Article XI, Section 2; and, second, whether

that section prohibited the legislature from enacting general laws affecting corporate bodies embraced within it. The decision of one question did not render the decision of the other *obiter dictum*. The issues which the court was compelled to decide in *Rose v. Port of Portland*, in order to adjudicate the litigation, involved an examination and decision of the question which the defendant is here attempting to raise, and what the court there said when deciding that question is *stare decisis*, even under a strict construction and the most exact application of that doctrine.

The conclusion unanimously agreed upon and announced in *Rose v. Port of Portland* was again followed, without a single dissenting voice, in *Colby v. City of Medford*, 85 Or. 485, 534 (167 Pac. 487, 502), for it is there said:

“The Bancroft Bonding Act was passed by the legislative assembly, and it is a statute of state-wide application, for it embraces every city and town in the state. The amendments found in Article IV, Section 1a, and Article XI, Section 2, of the Constitution, have not shorn the legislature of power to enact general laws concerning cities and towns: *Rose v. Port of Portland*, 82 Or. 541 (162 Pac. 498). Although passed prior to these two constitutional amendments, the Bancroft Bonding Act possesses just as much validity now as it did when originally enacted, for it governs, controls, and dominates every incorporated city and town in Oregon. * * The city is utterly powerless to enact and enforce municipal legislation which overrides this state law.”

The most casual reading of the opinion rendered in *Colby v. City of Medford* will demonstrate that the court confined its discussion to the issues raised by the pleadings and to the questions involved in those issues. Again, and for the third consecutive time the court unanimously approved the rule that the legislature was

not prevented from enacting general laws affecting cities and towns, for in *Portland v. Public Service Commission*, 89 Or. 325 (173 Pac. 1178), the court said, when speaking of the power to revoke certain authority previously given by the state to the city:

“The legislature in delegating this authority to the city by the 1903 charter did not, nor could it, undertake to control the future legitimate exercise of the law-making power. The authority to delegate involves the power to revoke. That this may not be done in this instance by special law enacted by the legislative assembly amounting to a direct amendment of the Portland charter is granted; but that a general law of paramount authority over all municipal charters constitutionally may be enacted by the legislative assembly is taught in *Rose v. Port of Portland*, 82 Or. 541 (162 Pac. 498).”

The last three announcements of this court ought to be regarded as decisive of the question attempted to be presented here, especially since two of them were decided by the court sitting *in banc* and only one was heard by a single department, and in none of them was there a single dissenting voice.

So thorough and complete is Chapter 203, Laws of 1917, that it may with propriety be called the Insurance Code. The purpose of this legislation is to provide for the entire state a uniform and complete system of regulation and supervision of the insurance business. Nearly all, if not all, the states have enacted legislation for the regulation and supervision of insurance business done within their respective borders. In Oregon the insurance business is conducted principally by foreign corporations, and this state has the supreme authority and the exclusive control over the admission of these corporations to do business here and the manner in which they may be permitted to transact

business. Probably every company admitted to do business here not only has representatives in Portland, but also has agents in other places and does business throughout the entire state. The insurance business is state-wide in its scope, and it is a proper subject for state-wide regulation. It is apparent that, among other purposes, the Insurance Code was adopted to encourage the admission of sound and solvent companies so that adequate service may be given at reasonable rates; to bring about the appointment as agents of only those persons who possess the requisite qualifications and to compel them to perform their duties faithfully; to supervise rates and to place the making of rates upon a uniform and scientific basis; and to derive such revenue from the business as will pay the expense of supervision by the state without excluding desirable companies or agents or raising rates or otherwise interfering with the general purposes of the law.

Evidently, the legislature concluded that local taxation in the form of licenses might defeat some or all of these purposes. The legislature may have reasoned that, if one city may impose a license fee, all may do so; and that such tax in one city or town or the aggregate of such taxes in all cities and towns might become prohibitive and drive out all companies or all but the strongest and best established, or prevent the entrance of new and desirable companies into the state. The legislature may have reasoned further that the natural tendency of municipal license fees is to raise rates both directly and through reduction of competition, and that it would be impossible to apportion such increases to the various cities and towns in proportion to the licenses charged therein. The legislature may have concluded that the entire state would suffer on account of burdens imposed by certain cities, and that the col-

lection by the state of revenue sufficient for its purposes might be defeated if any considerable number of cities should impose heavy licenses.

The defendant concedes "that certain general laws enacted by the legislature may be valid, although they have the effect of amending or repealing certain provisions of municipal charters," if they "pertain to matters which are of a general character as distinguished from matters which are purely local and municipal." Obviously, the Insurance Code pertains "to matters which are of a general character as distinguished from matters which are purely local and municipal"; and consequently even though Chapter 203, Laws of 1917, is to be tested by the rule contended for by the defendant, the statute must be held to be constitutional.

The decree of the Circuit Court is affirmed.

AFFIRMED.

BENSON, J., took no part in the consideration of this case.

Argued February 10, affirmed March 9, 1920.

BOOTH-KELLY LUMBER CO. v. WILLIAMS.

(188 Pac. 213.)

Sales—Stipulation that Railroad Expense Bill Should Govern Quantity of Cordwood was Binding.

1. Stipulation in contract that actual measurements of wood as shown by railroad expense bill were to govern the quantity of wood delivered to buyer was not subject to revocation by either party, and measurements made pursuant thereto and evidenced by expense bill of the railroad company, in the absence of fraud, or of such palpable mistake as would imply bad faith or a failure to exercise an honest judgment, are binding upon the parties to the contract.

Trial—Offer of Proof was Too General.

2. Offer to prove that plaintiff, with the purpose and intent of cheating, wronging, defrauding and overreaching defendant, loaded each car of cordwood delivered to defendant in a loose, criss-cross manner, etc., followed by reading all of the formal allegations of the answer as to fraud of plaintiff in piling the wood, was properly rejected; the evidentiary facts not being set forth.

Appeal and Error—Exclusion of Evidence not Reviewable Where Record Does not Show Evidence Expected.

3. Where it does not appear from the record what the offer of proof was, nor how the witness would have answered if permitted to do so, it will not be held on appeal that there was error in exclusion.

Trial—Exact Language of Requests Need not be Embodied in Instructions Given.

4. In suit involving question whether defendant received the number of cords of wood with which he was charged, where the court described a cord of wood to the jury in accordance with the statutory definition (Laws 1913, c. 325), defendant cannot complain that the charge is not in the exact language requested.

Interest—Stipulation as to Interest on Account Enforceable.

5. Where, under contract for sale and delivery of cordwood, it was stipulated that a certain amount was owing by defendant on account of prior transactions, and that interest should accrue on such amount from date of contract, contention that amount was part of an open, mutual, running account, and therefore should not be subject to interest, cannot be sustained.

Evidence—Defendant has Burden of Proving Specific Defense in Nature of Setoff.

6. The claim of defendant that he returned or left on the yards a certain number of cords of wood, with which his account should be credited, is in the nature of an offset or payment, and the court, after plaintiff had made out a *prima facie* case, properly charged the jury that defendant had the burden of providing his specific defense.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 2.

This is an action to recover a balance stipulated to be due and to recover the agreed purchase price of certain wood under the terms of a contract. The cause was tried before the court and a jury and a verdict rendered in favor of plaintiff for the sum of \$2,170.83. From a resulting judgment defendant appeals.

The contract relates to transactions between plaintiff and defendant in the wood business and covers a period from April 30, 1915, to September 30, 1916. It stipulates that on April 30, 1915, on account of prior transactions, there was due from defendant to plaintiff the sum of \$1,359.97, upon which interest should accrue from that date at the rate of 6 per cent per annum. It is also agreed thereby that on the same date there was on certain yards under the defendant's control 2,301 $\frac{1}{8}$ cords of wood previously delivered; and the contract also provides for future delivery of wood at \$2.25 a cord, F. O. B. cars at Eugene. By the terms of the contract all wood on the yards unsold when the contract was terminated should be taken over by the plaintiff and credited to the defendant at \$2.65 a cord. The contract provides that—

“The actual railroad measurements of the wood delivered to the party of the second part as shown by the railroad expense bill shall govern the quantity of wood delivered.”

The complaint sets forth the contract at length and the different items of debit and credit between the parties, of which the following is a summary:

Debits.

Balance shown by statement of April 30, 1915	\$ 1,358.97
Wood on yard April 30, 1915, 2,301 $\frac{1}{8}$ cords @ \$2.25	5,177.53
Wood delivered afterwards 4,617.34 cords @ \$2.25	10,388.99
Freight and demurrage charges	34.57
Total.....	\$16,960.06

Credits.

Cash	\$1,206.01
Hauling	39.69
Freight paid	164.01
Commissions	2.89
Cash received from sales of wood	9,356.72
Wood on yard September 30, 1916, 1,591.03 cords	4,216.91

Total..... \$14,986.23

Leaving a balance due from defendant to
 plaintiff under the contract of..... \$1,977.83
 —together with interest on \$1,358.97 thereof from
 April 30, 1915, at the rate of 6 per cent per annum.

The defendant answered, admitting the execution of the contract, the amount due April 30, 1915, and the number of cords of wood on the yard at that date, and admitting the credits allowed by defendant, and except as admitted denies the allegations of the complaint. Further answering, the defendant avers, in effect, that immediately subsequent to the execution of the contract plaintiff, with the purpose and intent of defrauding defendant and of securing from him payment for more wood than should be actually furnished under the contract, and with the purpose and result of thereby procuring from the railroad company as a basis of plaintiff's charges to defendant a wrongful, erroneous, and grossly excessive measurement of the wood upon each car delivered to defendant, and contrary to the terms of the contract, loaded "each car of wood in a loose, criss-cross, irregular, poor, and improper and unworkmanlike manner, in such a way and to the end and with the result that the same when loaded would and did, as to outward dimensions and appearance, apparently contain and measure more cords of wood than the same actually did contain"; and that plaintiff over-

charged defendant "approximately" one and one-half cords of wood upon each of the cars delivered to him under the contract. The defendant, as an affirmative defense, further pleaded that on September 30, 1916, when the contract was terminated, there was on the yards mentioned 2,299.07 cords of wood, with which the plaintiff failed to credit plaintiff's account at the agreed price of \$2.65 per cord. The reply put in issue the new matter of the answer. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Fred E. Smith*.

For respondent there was a brief over the name of *Messrs. Smith & Bryson*, with an oral argument by *Mr. E. R. Bryson*.

BEAN, J.—The bill of exceptions discloses that plaintiff, upon the trial of the cause, introduced evidence tending to support the allegations of the complaint. Error is predicated upon the following rulings upon the evidence: Mr. Williams, the defendant, as a witness in his own behalf, having stated that he saw the cars of wood shipped to him by plaintiff was interrogated as follows: "Q. Describe to the jury the sort of cars they were loaded on and how they came in?" Objection was made to the question by counsel for plaintiff as incompetent and not within the issues, and for the additional reason that under the contract the defendant was bound by the measurements of the railroad company as shown by the expense bills. The court sustained the objection and defendant saved an exception, whereupon in support of defendant's special defense of fraud counsel for defendant stated, in substance as follows: The defendant offers to prove that immediately subsequent to the execution of the contract

the plaintiff, with the purpose and intent of cheating, wronging, defrauding, and overreaching the defendant, loaded each car of wood delivered and charged to defendant "in a loose, criss-cross, irregular, poor, and improper and unworkmanlike manner, in such a way and to the end and with the result that * * this plaintiff has wrongfully, fraudulently, intentionally, and knowingly overcharged defendant approximately one and one-half cords of wood upon each and every car delivered him under said contract"; and continued reading all of the formal allegations of the answer as to the fraud of plaintiff in piling the wood as such tender of proof. The offer was denied and the defendant saved an exception. The record then shows the following:

"It is stipulated that the witness Hollis Moody is deemed to have been called, asked as to whether or not in making measurements he took into consideration the manner in which the wood was piled upon the car; objection made; the testimony excluded and offer of proof made; that the same was denied, to which ruling defendant excepted."

It is the position of plaintiff that the answer fails to allege any error on the part of the railroad company in measuring the wood.

The most that can be said in regard to the allegations of the special defense is that it is averred that the wood was irregularly piled and as a result plaintiff overcharged the defendant. Whether the person making the measurements inadvertently overlooked the spaces between the wood, or fraudulently or carelessly made an erroneous computation of the amount of wood on the several cars, does not appear by the pleading. There is no allegation that the measurer was deceived by the manner in which the wood was piled on the cars, or that

he failed to exercise his honest judgment in ascertaining the quantity of wood. The alleged defect in the piling must have been apparent to the measurer.

1. By the terms of the contract the actual measurements of the wood as shown by the railroad expense bill were to govern the quantities of wood delivered to defendant. In a sense the measurer of the wood on the cars was made an arbiter of the parties to the contract, as to the amount of the wood delivered. Such a stipulation is not subject to revocation by either party, and measurements made pursuant to such a contract and evidenced by expense bills of the railroad company, in the absence of fraud or of such palpable mistake as would imply bad faith, or a failure to exercise an honest judgment, are binding upon the parties to the contract. In short, such measurements so represented are *prima facie* correct and binding: *Sweeney v. Jackson Co.*, 93 Or. 96 (178 Pac. 365, 371); *Mundy et al. v. Louisville & N. R. Co.*, 67 Fed. 633, 637 (14 C. C. A. 583); *United States v. Hurley*, 182 Fed. 776 (105 C. C. A. 208); *Railroad v. Central Lbr. etc Co.*, 95 Tenn. 538 (32 S. W. 635); 6 R. C. L., p. 964, § 341.

It was incumbent upon the defendant, in order to impeach the measurements of the wood by the railroad company, to prove that the same were fraudulent or grossly erroneous. The pleading of the defendant should show how the result claimed was reached and not merely allege the result as a conclusion.

2. Passing the question of pleading, however, the evidence tendered and rejected was not sufficient to overcome the force of the expense bills. The objection to the competency of the question having been sustained, counsel for defendant read into the record the language of his pleading as an offer of proof. The tender of proof was properly rejected. It was too gen-

eral. The evidentiary facts were not set out. It does not appear by whom the defendant expected to prove the allegations, whether by the witness then on the stand or others. In making an offer of proof it is requisite that counsel should be distinct and clear. The tender should embody the specific fact or facts in such connection and in such terms as to be apprehended and ruled upon in the intended sense by the trial judge, and be examined and applied in the appellate court in the proper light to test the accuracy of the ruling, if adverse. A mere general proposition, to in so many words prove the averments of a pleading, is not one that the court is bound to take into consideration and rule upon as a tender of proof: 9 Ency. of Evidence, 165; *Columbia R. I. Co. v. Alameda L. Co.*, 87 Or. 277, 296 (168 Pac. 440, 441), where Mr. Justice McCAMANT says:

“An offer of proof should state facts rather than conclusions. Its language should be not vague, but distinct; not general, but specific. It is not sufficient that it state the ultimate facts in language appropriate to a pleading; the evidentiary facts must be set out.”

See *Harmon v. Decker*, 41 Or. 587, 592 (68 Pac. 11, 1111, 93 Am. St. Rep. 748).

3. It was stipulated that the witness Hollis Moody was deemed to have been called and asked whether or not in making measurements he took into consideration the manner in which the wood was piled upon the car; that objection was made, the testimony excluded, and offer of proof made. It does not appear from the record what the offer of proof was nor how the witness would have answered if permitted to do so; that is, whether he made an allowance for the loose manner in which the wood was alleged to have been piled and made a correct measurement of the wood or otherwise.

The court cannot determine whether any testimony favorable to defendant was excluded or not: *Hill v. McCrow*, 88 Or. 299, 309 (170 Pac. 306). Error will not be presumed. The burden developed upon the defendant to show that the testimony offered was admissible and that he was prejudiced by its exclusion. No prejudicial error appears by reason of the exclusion of the testimony tendered.

4. Defendant's counsel requested several instructions to the jury in conformity with defendant's theory of the case. With reference to the first five requests, it is contended that Chapter 325, General Laws of Oregon 1913, defines a cord of wood and is a penal statute; that this law was a part of the contract; and that it was incumbent upon the plaintiff under the contract to furnish defendant a legal cord of wood for each one charged. The court described a cord of wood to the jury in accordance with the statutory definition. While the charge is not in the exact language requested, defendant has no cause for complaint in this regard.

The testimony is not all contained in the record; but the bill of exceptions discloses that it tended to show, and the jury found, that pursuant to the contract the plaintiff furnished and delivered to defendant the wood charged in the complaint in accordance with the measurement defined by law.

5. Error is claimed by reason of the allowance of interest upon the \$1,358.97 stipulated to be due from defendant to plaintiff on April 30, 1915. It is claimed that this amount is a part of an open, mutual, running account. Therefore it should not be subject to interest. It is plainly stipulated by the contract that the amount then due should bear interest at the rate of 6 per cent per annum from date until paid. It was perfectly competent for the parties to so agree in writing. A prom-

issory note would not have been of any more binding force. It is alleged and shown that that amount was due from defendant to plaintiff and unpaid at all times after making the contract until suit. There was no error in allowing such interest.

Defendant, as a special defense, alleged that there were 2,299.07 cords of wood on the yards when the contract terminated September 30, 1916, with which plaintiff failed to credit defendant. The defendant admitted the delivery of the number of cars of wood and that the railroad expense bills showed the number of cords as claimed by plaintiff. Over the objection and exception of defendant, the court charged the jury that it was incumbent upon the defendant to prove the allegations of his affirmative answer. Defendant assigns such instruction as error.

6. The claim of defendant, that he returned or left on the yards 2,299.07 cords of wood, with which his account should be credited, is in the nature of an offset or payment, and the court, after plaintiff had made out a *prima facie* case, properly charged the jury that the burden was upon the defendant to prove his special defense. There was no prejudicial error in giving such instruction. The question of how much wood remained upon the yards on September 30, 1916, was carefully submitted to the jury by a special verdict. The jury found there was no more wood on the yards than credited by plaintiff to defendant's account.

The trial court explained to the jury the several provisions of the contract and the issues made by the pleading, and charged the jury to find the facts in accordance with the evidence "and not upon passion and prejudice"; also "that a corporation and an individual in a lawsuit stand upon a basis of absolute equality."

We have carefully read the entire charge, and approve the same. The requested instructions of the defendant, in so far as they should have been given, were in substance embodied in the charge given to the jury.

There is a claim made by defendant that the wood on hand when the contract took effect April 30, 1915, was wrongfully charged the second time. A careful examination of the matter shows that such is not the case. The jury was particularly qualified to pass upon the matter of piling and measuring the wood, and we think they fairly did so.

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued October 9, reargued December 22, 1919, reversed and remanded March 9, 1920.

SMITH v. BARNER.

(188 Pac. 216.)

Pleading—Answer Held not Admission That Note was Indorsed Without Recourse.

1. Where defendant alleged that as trustee he transferred the note sued on without recourse to himself, *held* that such averment in the answer was not an admission that the note was indorsed without recourse.

Bills and Notes—Where Trustee Transferred Note not Shown to be Negotiable, and it was not Established That the Indorsement was One Technically Known as Without Recourse, No Implied Warranty Resulting from Such Indorsement Arises.

2. Where defendant alleged that, holding as trustee the note sued on, he transferred it without recourse to himself, and the complaint did not show the indorsement of a negotiable instrument without recourse, no implied warranty created by the Negotiable Instruments Act (Section 5898, L. O. L., et seq.) arises on the theory that the transfer was an indorsement of a negotiable instrument without recourse.

Evidence—Where Note is Indorsed Without Recourse, Parol Evidence is Inadmissible to Explain Indorsement.

3. Under Section 5898, L. O. L., where a note is indorsed without recourse, the statutory terms and provisions become a part of the indorsement, and parol evidence is not admissible to explain the written indorsement or in defense, as is the case where the transfer is by delivery only.

From Yamhill: HARRY H. BELT, Judge.

In Banc.

The plaintiff alleges that on March 10, 1914, the defendant, by written assignment, sold and delivered to him a certain promissory note executed on August 18, 1913, for value, by Frank H. Greenman and wife to the defendant, in the sum of \$8,000, payable on or before five years after date, with interest at 7 per cent per annum. As a part of the same transaction, the plaintiff says, the defendant assigned a certain mortgage deed executed to secure the note, upon real property in the town of Sunnyside, Yakima County, Washington, which was then and is now of the value of about \$12,000. It is further alleged that at that time and in consideration thereof the plaintiff paid the defendant \$6,700 in cash, and that:

“By the said sale and delivery of the said promissory note and mortgage deed, the said defendant did covenant to and with this plaintiff, that he was the owner of and had good right to sell and transfer the said instruments to this plaintiff, and that they were valid instruments of the character they purported to be.”

It is then averred that the defendant did not keep his covenant, and that the same was broken, “because the said promissory note and mortgage deed were not valid instruments” of the character they purported to be, but their execution had been obtained from the said Frank H. Greenman and his wife by fraud and misrepresentations. The facts constituting such fraud

and misrepresentations are then set forth in detail. By way of estoppel the plaintiff alleges:

“That the said defendant ought not to be admitted to deny the fraud and fraudulent representations alleged in the procurement of said promissory note and mortgage, and as set forth and alleged in the third paragraph of this complaint, for that

“On the tenth day of March, 1914, Frank H. Greenman and Olive R. Greenman, his wife, duly commenced an action in the Superior Court of the State of Washington for Yakima County, which court was then and there a court of general jurisdiction, under the laws of the State of Washington, and had full and complete jurisdiction over the subject matter of the action, to cancel and set aside for fraud and misrepresentations in obtaining the execution of the said promissory note and mortgage above described, against one C. W. Swartz and one J. R. Prigmore and the defendant, B. B. Barner, and caused summons in said suit to be served upon each of the defendants prior to the tenth day of March, 1914, and prior to the sale of said instruments to this plaintiff, and

“For that, the allegations made in said complaint, commenced in Yakima County, Washington, aforesaid, were and are the same allegations and statements of fraud and misrepresentation as are those alleged and set forth in paragraph three of this complaint, and

“For that, the said C. W. Swartz, and the defendant, B. B. Barner, and J. R. Prigmore failed and neglected to appear in or answer the complaint in the suit to set aside and declare void the said promissory note and mortgage above described, although duly served with summons therein, as by law provided in the state of Washington, and defaulted in said suit, and

“For that, thereafter, on the twenty-third day of May, 1914, a decree of the said superior court of the State of Washington for the county of Yakima was duly rendered and entered of record in said suit, in favor of the said Frank H. Greenman and Olive R. Greenman, and against the said C. W. Swartz, B. B. Barner, and J. R. Prigmore, defendants in said suit, declaring,

adjudging, and decreeing that the said promissory note and mortgage deed above described were obtained by fraud perpetrated by the said C. W. Swartz and B. B. Barner upon the said Frank H. Greenman and Olive R. Greenman, his wife, and that the same were fraudulent and void, and should be and were canceled and set aside and held to be of no effect. The fraud for which the court set aside, canceled, and annulled the said note and mortgage being the same as were contained in the complaint in the action then pending in Yakima County, State of Washington, hereinabove referred to, and being the same matters and things as alleged and set forth in paragraph three of this complaint; that said superior court for the State of Washington was then and there a court of general jurisdiction, having full and complete jurisdiction over the subject matter of the action, and

“For that a decree of said court is conclusive and binding, not only upon the said defendants in said action, but upon this plaintiff.

“Wherefore, the plaintiff prays judgment that the said defendant, B. B. Barner, should not be admitted to deny the fraud in obtaining said instruments as hereinbefore alleged.”

“That by reason of the said fraud so perpetrated by the said B. B. Barner and the said C. W. Swartz in the aforesaid transaction between themselves and the said Frank H. Greenman and Olive R. Greenman, wherein the said promissory note and mortgage were executed, and by reason of the said decree of the said Superior Court of the State of Washington, for the County of Yakima, declaring the said transaction of the said promissory note and mortgage fraudulent and void, this plaintiff was and is forever precluded from foreclosing the said mortgage deed, or collecting the sum named in the said promissory note, or any part thereof.”

It is asserted that by reason of such facts the plaintiff was and is now damaged in the sum of \$6,700, with

interest from March 31, 1914, for which he prays judgment.

In his answer the defendant admits the purchase and assignment of the note and mortgage as alleged, but denies every other allegation in paragraphs 2, 3, 4, and 5, of the complaint, except as set forth in the further and separate answer, and makes a general denial of paragraph VI. For affirmative defense, he alleges that on June 4, 1913, one C. W. Swartz was the owner in fee of the real property described in the complaint, and desired to transfer the title to the defendant, to be held by the latter in trust for him; that on June 5, 1913, Swartz made such conveyance without any consideration; that since that time the defendant has held the bare legal title to said property as trustee, having no authority to transfer it without the express consent of Swartz, and—

“That on or about the eighteenth day of August, 1913, the said Swartz stated to the defendant herein that he was about to exchange said property for 640 acres of farming land in Alberta, Canada, and directed said defendant, as trustee for said Swartz, to execute a deed to said property in Yakima County, Washington, to one Frank Greenman and Olive R. Greenman, husband and wife, and further stated to this defendant that said Greenman and wife would execute to this defendant a deed for said property, together with a mortgage in the sum of \$8,000 on the said property in Yakima County, Washington, being the same property conveyed by this defendant as the trustee for said Swartz. That on the eighteenth day of August, 1913, the said Greenman and his wife deeded to this defendant, as the trustee for the said Swartz, the said land in Canada, subject to a mortgage of \$4,000, and this defendant, acting as a mere trustee for said Swartz, without interest, deeded the said Sunnyside property in Yakima County in Washington to the said Greenman and his wife, and on the twenty-third day

of August, 1913, the said F. H. Greenman and his wife executed and delivered to this defendant, as trustee for Swartz, their note for \$8,000, secured by a mortgage on said Sunnyside property in Yakima County, Washington. Said mortgage was duly filed for record. That this defendant acted merely as trustee in said transaction for said Swartz, and took no part in the negotiations for the exchange of said properties, made no statements or representations to said Greenman or his wife, concerning said exchange of property, knew nothing of the terms or conditions of the exchange, and in truth and in fact, never saw or held any conversation or communications, written or otherwise, with the said Frank H. Greenman or his wife, and had no other knowledge of the said transactions, nor any knowledge as to what was said by said Swartz to said Greenman and his wife. That subsequent thereto the said Swartz stated to this defendant that he had sold said note and mortgage, executed by said Greenman and wife to the plaintiff herein, and subsequently presented to this defendant a written transfer and assignment of said note and mortgage for execution, which he [Swartz] had caused to be prepared, and requested defendant to execute the same for and on his, the said Swartz's, behalf. That this defendant in obedience thereto did transfer said note and mortgage to the plaintiff herein. That this defendant took no part in the negotiations leading up to the sale of said note and mortgage to the plaintiff, held no written or other communications with the plaintiff regarding the same, made no representations to plaintiff, but acted merely as the trustee for and on behalf of said Swartz. That all of the negotiations prior and subsequent to said sale of said note and mortgage were carried on solely and only between the plaintiff herein and said Swartz. That no consideration moved from the plaintiff herein to this defendant personally. That this defendant received the sum of \$6,700 in cash only as the trustee for said Swartz, and immediately after the same was received said sum was paid over to the said Swartz by defendant. That the plaintiff herein

had full knowledge of all these facts, and had full knowledge that this defendant was a mere trustee, without interest or consideration in said transaction, and had full knowledge of the fact that said Swartz was the real owner of said note and mortgage, and that it was Swartz he was dealing with and not defendant; and had all such knowledge prior to the date when said note and mortgage were sold. That defendant transferred the said note without recourse as to himself.

“That the said action begun by said Greenman in the Superior Court of the State of Washington for Yakima County, as set forth in paragraph four of the complaint in this action, was not begun alone against this defendant, but against said Swartz, and plaintiff herein had full knowledge that said action had been begun against said Swartz when he actually purchased the said note and mortgage, and had knowledge that defendant acted merely as a trustee for said Swartz, without interest or consideration, in the transactions with said Greenman and wife and had knowledge of the fact that in said transactions with Greenman and wife the defendant had taken no part in them, save to act as a mere trustee in transferring titles.

“That after the plaintiff herein had purchased said note and mortgage, under said circumstances, he began an action to foreclose the same against the said Greenman and wife in the Superior Court of the State of Washington for Yakima County, and a decree was entered against the plaintiff herein, denying a foreclosure of said mortgage, for the reason that the plaintiff had knowledge, before the purchase of said note and mortgage, of the pendency of the said case of Greenman and wife against Swartz, and this defendant, and of the fact that this defendant was a mere trustee for the said Swartz, and that defendant was in no other manner connected with the transaction, and had full knowledge that defendant had not made any statements or representations, fraudulent or otherwise, in said matter to or with said Greenman and wife, and

said plaintiff should not now be permitted to deny that he had knowledge of all of said facts. That by reason of all such facts, and the knowledge of said plaintiff, it was not the duty or incumbent on the part of this defendant to appear in said case."

The decision in that case was later affirmed by the Supreme Court of Washington. It is next averred that the plaintiff should be estopped to claim or assert that the defendant is in any way responsible for his indorsement or the assignment of the note and mortgage, and that he should proceed against Swartz, who is the real party in interest.

To this further and separate answer the plaintiff filed a demurrer upon the following grounds:

"The plaintiff demurs to all of the further and separate answer and defense contained in the answer herein upon the ground that the same does not state facts sufficient to constitute a defense to plaintiff's cause of action.

"Plaintiff also demurs to the entire answer of defendant upon the ground that the said answer does not state facts sufficient to constitute any defense to the complaint herein, including the denials and the separate and further affirmative answer."

The demurrer was sustained on May 18, 1918, and the cause was continued to June 17th following, for the taking of proof as to the amount of damage. The defendant declined to plead further, and on that day a jury rendered a verdict in favor of the plaintiff and against the defendant for \$8,416.32, upon which judgment was duly entered. The defendant appeals, contending that "the court erred in sustaining the demurrer to the further and separate answer and defense of the appellant." That is the only error assigned.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Frank S. Grant*.

For respondent there was a brief over the names of *Messrs. McCain & Vinton, Mr. Walter L. Tooze, Jr., Mr. P. C. Sullivan* and *Mr. J. E. Burdette*, with oral arguments by *Mr. W. T. Vinton* and *Mr. Sullivan* (with *Mr. Tooze, Jr.*, on former argument).

JOHNS, J.—1. It is very apparent that this case was tried in the Circuit Court on the theory that the note in question was a negotiable instrument, and was indorsed in writing by the defendant “without recourse.” The complaint alleges that the defendant “by a written transfer and assignment sold, assigned, and delivered to the plaintiff a certain promissory note in writing executed on the eighteenth day of August, 1913, for value received, by Frank H. Greenman and Olive R. Greenman, his wife, to B. B. Barner.” The note is not pleaded *in haec verba*, and the allegation quoted is not equivalent to saying that it was a negotiable instrument or that it was indorsed “without recourse.” The answer admits that the “defendant transferred the said note without recourse to himself.” That is not an admission that it was indorsed “without recourse.”

2. The writer was under the impression that in the original argument here it was conceded by appellant’s counsel that the note was negotiable and that it was indorsed “without recourse” in writing. On reargument counsel for defendant disclaimed any such admission and advised this court that he stood on his legal rights as they appeared from the pleadings. The distinction is important. For failure to make such allegations in the complaint, and in the absence

of such admission, the case would not come within the terms and provisions of the Negotiable Instruments Act (Section 5898, et seq., L. O. L.), or the legal effect of an implied warranty as therein defined; and for such reason the demurrer to the defendant's further and separate answer should have been overruled.

The defendant cites and relies upon *Carroll v. Nodine*, 41 Or. 412 (69 Pac. 51, 93 Am. St. Rep. 743), where it was held:

"An indorsement without recourse is not a contract, but merely operates to transfer the title; and hence parol evidence is admissible, to show that at the time of the transfer of a note by indorsement without recourse the buyer agreed to take the paper at his own risk, absolutely relieving the indorser even from the implied warranty of genuineness attending such a transfer."

That decision was founded upon a cause of action which arose before the negotiable instruments law was enacted and under the law-merchant as it then existed, and it is alleged in the answer:

"That at the time the defendant sold and indorsed the note to plaintiff, he was fully informed of all matters concerning the credit made thereon of date October 26, 1893, and that the same was a valid and genuine payment; that he then guaranteed that she should never at any time be held liable upon said note in any capacity, or for any part thereof; and that her indorsement of said note without recourse would, and in fact did, forever relieve and protect her from all liability thereon."

3. As we construe Section 5898, L. O. L., there is a vital distinction between the defenses which may be pleaded to an action upon a negotiable promissory note where the title passes by delivery and where it is

acquired by indorsement "without recourse." When it is transferred by delivery only, the transaction rests in parol, and a defense in parol may then be made. Under the negotiable instruments law, when such a note is indorsed "without recourse," it then becomes and is a written contract. The statutory terms and provisions are incorporated in and made a part thereof, and parol evidence is not admissible to explain or vary the written indorsement.

The case is reversed and remanded, with leave to each party to apply to the Circuit Court to file amended pleadings. REVERSED AND REMANDED.

BENNETT, J. (Concurring in Result).—I concur in the result reached by Mr. Justice JOHNS in his opinion that this cause must be reversed.

There is absolutely no allegation in the complaint that the paper was made payable to order, or to bearer, or was negotiable in any way. Neither is there any allegation that the transfer by the defendant to the plaintiff was by indorsement on the back of the note. For all that appears, it may have been transferred by a separate and distinct paper, in which event it would not be a transfer within the negotiable instruments law. Therefore, it is clear that in the condition of the pleadings the judgment on the demurrer to the answer cannot stand.

But I cannot concur in what is said in the opinion as to the construction of Section 5898, L. O. L., or in the conclusion reached that the implied warranty mentioned in that section, applies when the indorsee has full knowledge of the entire facts, and agrees, either expressly or impliedly, that he will take his chances on the defective title.

In my judgment, such a construction was never contemplated by the legislative mind, and will work a gross fraud and injustice, not only in this case (if it shall turn out that there was such an understanding), but in a multitude of other cases where paper of this kind is transferred on speculation with full knowledge of the facts, and with the agreement and understanding that there is no warranty, and that the purchaser takes his chances. Such a construction of the section makes the law a pernicious trap to catch even the wary—to say nothing of the unwary.

No business man would suppose that by simply assigning a note and putting his name under the words "*without recourse*," he was signing a *written contract for recourse*, and a written contract which would absolutely shut him out from showing what was the real understanding and agreement. Such a construction puts the purchaser in bad faith and with full notice, upon exactly the same plane with the purchaser in good faith and in due course without notice—a proposition which is abhorrent to the whole spirit of the Negotiable Instruments Act.

An indorsement "*without recourse*" was never considered such a written contract, and the implied warranties thereunder were always subject to parol evidence of the real agreement of the parties at common law and by the law-merchant.

"The implied warranty is necessarily founded in good faith, and it will not attach except where the party relying upon such warranty has acted in good faith": 8 C. J., p. 393, § 579.

To same effect see *Id.*, § 578.

"The contract of sale or transfer * * may be made in such form, or under such circumstances as to exclude the warranty of genuineness, which would

be otherwise implied by law. This has been held by repeated decisions": Id. § 579.

Warranty in the sale of commercial paper runs only to the holder in due course: *Bruck v. Lambeck*, 63 Misc. Rep. 117, (118 N. Y. Supp. 494); *James v. Yeager*, 86 Cal. 184 (24 Pac. 1005).

Knowledge of the facts rebuts warranty: *Moore v. Worthington*, 63 Ky. (2 Duv.) 307.

If at the time of sale the seller expressly refuses to warrant, there is no warranty: *Gilfert v. West*, 37 Wis. 115; *Bell v. Dagg*, 60 N. Y. 528.

In *Strange v. Ellison*, 2 Bailey (S. C.), 385, it is said:

The seller of a promissory note warrants "that the indorsements are genuine, *unless it appears that the transferee took it without reference to that security, or had agreed to run the risk of the indorsement being not genuine.*

"But, notwithstanding the general principle, it is equally certain that the contract of sale or transfer * * may be made * * under such circumstances as to exclude the warranty of genuineness, which would otherwise be implied by law": *Straus v. Hensey*, 7 App. D. C. 289.

"It seems to me it would be absurd to hold that on the sale of property any fact affecting its title, quality, or validity, which is distinctly disclosed and known to the purchaser, can be said to be warranted by implication not to exist": DAVIS, Judge, in *Curtis v. Brooks*, 37 Barb. (N. Y.) 479.

In 24 R. C. L., Section 455, it is said:

"A warranty of title is annexed by law to a sale of personalty only where there is nothing in the circumstances of the case to rebut that presumption."

This question was carefully considered by the Supreme Court of New York in *Bank v. Gallaudet*, 120

N. Y. 298, 308 (24 N. E. 994, 996), in which the court said:

"The question as to whether there was an implied warranty depends upon the facts as to whether the defendant was an agent and disclosed his agency to the plaintiff, or whether that fact was known and understood by its officers in making the purchase."

And the cases of *Wilder v. Cowles*, 100 Mass. 487, and *Worthington v. Cowles*, 112 Mass. 30, are to the same effect.

There certainly was no *written* contract attached to such an indorsement in this state, independent of the statute, for the careful and deliberate decision of this court, formulated by one of the most eminent and learned of its judges, concurred in by a unanimous court, is to the contrary; and is in entire harmony with the general rule as shown by the authorities just quoted.

In *Carroll v. Nodine*, 41 Or. 412 (69 Pac. 51, 93 Am. St. Rep. 743), Mr. Justice WOLVERTON said:

"Where the transfer is by indorsement without recourse, or by delivery, the vendor's liabilities arise from the fact or contract of sale, and not upon the paper. * * Where an article of personalty in the vendor's possession is sold and delivered to another, and nothing is said, there goes along with the contract an implied warranty of title, and a failure thereof renders the vendor liable. The implied warranty attending the sale of commercial paper arises upon like principle. * * But we have seen that such an indorsement *does not constitute a contract in writing*, and serves merely to transfer title, as in the case of delivery when payable to bearer."

It is urged that the above decision was rendered as to paper, dated prior to the passage of the negotiable instruments law, and that, although it was rendered

three and one-half years after the passage of that act, yet that it had reference to the law as it was before, and not after, the act.

Granted that this is so; what words shall we point to in Section 5898, or anywhere in the body of the act, upon which we can predicate a decision, that the act made the implied contract a contract *in writing*, where by the law-merchant and by our own solemn decision there had been no contract in writing before. Where is the word or words that will bear that construction? I find none. Certainly the law does not *say* that the contract which it implies shall be a *written* contract. On the contrary, it is entirely silent in that regard, and leaves the contract to be implied from the *transaction* and not from any written words; just as it was implied from the transaction and not from any written words by the law-merchant, as declared by the authorities generally and by our own solemn decision. Not only is there no word in the statute saying that the contract shall be in writing, or treated as in writing, but all the terms of the act, when taken together, show that this was not the intention.

Section 5871, L. O. L., provides:

“A qualified indorsement constitutes the indorser *a mere* assignor of the title to the instrument.”

Is it not perfectly clear that this language puts the indorser without recourse, in exactly the same position as one who assigns by delivery, or orally, or by a separate written assignment upon another paper?

Again, how can we say that the statute makes a distinction between the warranty by mere delivery, and the warranty by indorsement without recourse, when the statute actually *couples them in the same phrase*, and makes exactly the same warranty apply to both.

Every person negotiating an instrument "by *delivery* or by a *qualified indorsement*," warrants, etc.

Whether or not Judge WOLVERTON, in writing the opinion in *Carroll v. Nodine*, 41 Or. 412 (69 Pac. 51, 93 Am. St. Rep. 743), had this statute in mind, and recognized it as declaring the law-merchant as it had previously existed, is it not plain that his language is just as applicable as though he had the statute before him and recognized the warranty of the indorser without recourse as just the same, and to be coupled with the warranty by delivery, just as the statute couples them?

It follows that the statute of frauds does not enter into this case at all, because there was no written contract, in so far as a warranty was concerned, and the warranty mentioned by the statute is an implied warranty only, which exists without regard to the indorsement, from a mere sale and delivery of the note.

There is no reason, then, why this implied warranty from a mere sale of the article may not be changed or limited or abrogated by a parol agreement, either expressed or implied, just as fully and to the same effect that it could be done by a formal written agreement: *Carroll v. Nodine*, 41 Or. 412 (69 Pac. 51, 93 Am. St. Rep. 743).

The warranty of the seller of a negotiable promissory note, who transfers the same by delivery or indorsement without recourse, is identical with the warranty of the vendor of any other kind of property, who, primarily, in all cases warrants the title to the same; but this warranty may always be overcome by direct or circumstantial evidence tending to show that there was in fact no warranty, but that the buyer took the title with knowledge and at his own risk.

In a note to 62 Am. Dec., p. 463, it is said:

"In America the authorities are uniform to the point that on a sale of chattels * * there is always an implied warranty of title, *unless the circumstances are such as to show that the vendor was not selling as owner,* * or that the purchaser was to take the risk of the title.*"

Argued January 7, affirmed February 17, rehearing denied March 16, 1920.

DANIELS v. FOSTER & KLEISER.

(187 Pac. 627.)

Trover and Conversion—Demand and Refusal Essential.

1. If a person is rightfully in possession of the property of another, and is neither asserting title to it nor exercising such dominion over it as is inconsistent with the right of the owner, then ordinarily a demand must be made for the property, followed by refusal to deliver, in order to work a conversion.

Trover and Conversion—Trespass With Assertion of Control Sufficient to Establish Conversion.

2. In trover, it is not enough that the facts show a trespass; yet, if the defendant exercise some act of dominion or control over plaintiff's property in denial of plaintiff's right or inconsistent therewith, defendant is properly charged with a conversion.

[As to conversion sufficient to maintain trover, see note in 24 Am. St. Rep. 795.]

Trover and Conversion—Allegation of Demand Unnecessary Where There has Been Conversion.

3. Where a conversion has actually occurred, there is no necessity of alleging and proving a demand and refusal to maintain an action of trover.

Action—Plaintiff may Waive Tort and Maintain Assumpsit.

4. Where defendant appropriated plaintiff's property, plaintiff may waive the tort and maintain an action in *assumpsit* for the value of the property, even though defendant had not sold and converted the same into money.

Appeal and Error—No Presumption of Error.

5. There is no presumption that the trial court erred, and error must affirmatively appear before a ruling on a motion for nonsuit will be disturbed.

Appeal and Error—Order Sustaining Nonsuit cannot be Disturbed in Absence of Bill of Exceptions.

6. In an action by an executrix, who claimed that defendant had torn down a building belonging to her testator and had ap-

propriated the lumber and fixtures, etc., where the trial court granted defendant's motion for nonsuit on the ground that the evidence did not show any demand by plaintiff on defendant for the property, *held* that, where there was neither bill of exceptions nor transcript of any part of the testimony, the order sustaining the nonsuit cannot be disturbed, even though the action be treated as one in *assumpsit*, for the pleadings did not show a conversion, and if the acts of defendant did not amount to a conversion in themselves, a demand was necessary.

From Multnomah: HARRY H. BELT, Judge.

Department 1.

This is an action to recover \$500. the alleged value of a building which, the plaintiff claims, was wrecked and appropriated by the defendant Foster & Kleiser, a corporation. When the plaintiff "had completed the introduction of her testimony" the defendant moved for a judgment of nonsuit. The court sustained the motion and the plaintiff appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. L. E. Schmitt*.

For respondent there was a brief and an oral argument by *Mr. Lawrence A. McNary*.

HARRIS, J.—There is no bill of exceptions. There is no transcript of any of the evidence. We have before us no part of the record made in the Circuit Court, except the pleadings, consisting of an amended complaint, an answer and a reply, and the recorded order allowing the motion for a nonsuit. The pleadings and the order made on the motion for a nonsuit are the only sources of information accessible to us, and our knowledge of what occurred in the Circuit Court is limited to whatever is revealed by that order and those pleadings.

The first three paragraphs of the amended complaint contain nothing but formal allegations to the effect that Sarah Jane Daniels is executrix of the estate of Edward J. E. Thompson, who died on December 29, 1916, and that the defendant is a corporation. In paragraph IV it is averred that Thompson became the owner by purchase of the building and fixtures located at 314½ E. Morrison Street in Portland, and that "subsequently thereto said premises were rented up to about July 1, 1916, when it became vacant."

Paragraphs V and VI are as follows:

"That the aforementioned building so owned by said Thompson was standing on leased ground owned by John S. Beall and one Mr. Weaver, who rented it to said Thompson and subsequently to his guardian, until said building was taken and removed by defendant as hereinafter alleged.

"That on or about the 1st of October, 1916, the said defendant, without notice to or knowledge of said Thompson or his guardian, did completely wreck and remove the building so owned by said Thompson as aforesaid, including the fixtures contained therein, and converted the same to his own use and benefit, and erected in the place where said building stood its sign and billboard."

After alleging in paragraph VII that the reasonable value of the building and its contents at the time of its removal was \$500, the amended complaint concludes with a demand for a judgment for \$500.

In legal effect the answer admits paragraph IV of the amended complaint.

Referring to paragraph V of the amended complaint the answer is as follows:

"That as to whether or not any of the allegations contained in paragraph V of the amended complaint is true this defendant has no knowledge or informa-

tion sufficient to form a belief, excepting that defendant admits that John S. Beall, et al. are, and were at all times mentioned in the complaint, the owners of the ground at the location known as No. 314½ East Morrison Street, in the City of Portland, Oregon."

Paragraph VI is denied, except as alleged in the further and separate answer. Paragraph VII is denied without qualification, and then the defendant sets out a further and separate answer, in which the corporation avers that, as agent of and acting under the direction of John S. Beall and associate owners of the land, the defendant did in October, 1916, take down a small metal building situated on the land and remove it without damage to it and stored it, together with all the fixtures, in the defendant's warehouse in Portland "where the same now are and ever since have been, but that as to who is or was the owner of said building, at the time the same was so taken down and removed, this defendant has no knowledge or information sufficient to form a belief"; that prior to October 1, 1916, the defendant leased the land for the purpose of constructing "thereon advertising signs and displays," and that thereupon and without any knowledge on its part as to the ownership of this vacant building, or the fixtures in it, and under the direction of the owners of the land, the defendant removed the building and fixtures to its warehouse "subject to the delivery thereof to the lawful owner." The defendant further alleges that neither the plaintiff nor the decedent was the lessee of the premises "on or after October 1, 1916, nor for some time prior thereto." The defendant avers that tender and delivery of the building and fixtures "is and will be made to the owner thereof upon proof of such ownership, the same being of no greater value than the sum of \$25."

The reply denies all the further and separate answer.

The following is a transcript of the recorded order allowing the motion for a judgment of nonsuit.

"This cause coming on regularly for trial on this day before the court and a jury, the plaintiff appearing in person by Schmitt and Schmitt, her attorneys, and the defendant appearing by L. A. McNary, its attorney, and the testimony of George M. Smith, a witness for the plaintiff having been taken, and the plaintiff having rested, and the defendant by its attorney thereupon having moved for a nonsuit on the ground of the failure of the plaintiff to allege or prove demand upon defendant for the surrender of the property alleged to have been converted by the defendant to its own use and the court being fully advised upon the said motion:

"It is now therefore ordered and adjudged that the motion of the defendant for a nonsuit against the plaintiff be and the same is hereby allowed, and such nonsuit is granted in favor of the defendant and against the plaintiff herein."

The plaintiff argues that the judgment must be reversed on the theory that the record presented to us necessarily shows that the court sustained the motion for a judgment of nonsuit on the ground "of the failure of the plaintiff to allege or prove demand upon defendant for the surrender of the property," and that such ruling was necessarily erroneous; while the defendant insists that the judgment must be affirmed for the reason that error must be made affirmatively to appear and, since there is neither a transcript of all the evidence nor any kind of a bill of exceptions it must be presumed that the judgment of nonsuit was properly granted.

1-3. If a person is rightfully in possession of the property of another, and is neither asserting title to

it nor exercising such dominion over it as is inconsistent with the right of the owner, then ordinarily a demand must be made for the property, followed by a refusal to deliver, in order to work a conversion: *Ramsby v. Beezley*, 11 Or. 49 (8 Pac. 288); for in such a case, there is no conversion until there is a demand and a refusal, and the demand ordinarily becomes necessary before the rightful possession is transformed into a wrongful possession. While, as ruled in *Lee Tung v. Burkhart*, 59 Or. 194, 204 (116 Pac. 1066), a case in some of its material particulars similar to the one here, in trover it is not enough that the facts show a trespass, yet, if the defendant exercised some act of dominion or control over the plaintiff's property in denial of her right or inconsistent with it, then the defendant is properly charged with a conversion of the property: *Walker v. First Nat. Bank*, 43 Or. 102, 104 (72 Pac. 635); *Madden v. Condon National Bank*, 76 Or. 363, 367 (149 Pac. 80); *Newman v. Jenne*, 47 Me. 520. Where a conversion has actually occurred, there is no necessity of alleging and proving a demand and refusal: *Cobbey on Replevin*, § 449; *Rosenau v. Syring*, 25 Or. 386, 389 (35 Pac. 845). See, also, *Caples v. Ditchburn*, 87 Or. 264, 269 (169 Pac. 510).

4. If the defendant did in truth wreck, destroy and appropriate the building and fixtures to its own use, then the plaintiff can sue the defendant in trover, or, if she chooses she can waive the tort and maintain an action in *assumpsit* for the value of the property, even though the defendant has not sold and converted the property into money: *Crown Cycle Co. v. Brown*, 39 Or. 285 (64 Pac. 451); *Reynolds v. New York Trust Co.*, 188 Fed. 611 (110 C. C. A. 409, 39 L. R. A. (N. S.) 391); 2 R. C. L. 775. See, also, 1 C. J. 1033. If a

conversion did in truth occur, then it was not necessary for the plaintiff to allege a demand for a surrender of the property, whether she brought an action in trover or an action in *assumpsit* on an implied contract.

In *Braithwaite v. Aiken*, 3 N. D. 365 (56 N. W. 133, 136), it is said:

“To establish a cause of action in *assumpsit*, the waiver must be averred either expressly or by the manner of stating the cause of action, for without the waiver no cause of action in *assumpsit* arises. It is not the wrong which gives the injured party the right to sue on contract; it is the wrong, coupled with the waiver of the tort. The waiver is an indispensable element in the cause of action.”

The plaintiff contends that she has elected to sue in *assumpsit*. We shall assume, without deciding, that the complaint complies with the rule announced in *Braithwaite v. Aiken*, 3 N. D. 365 (56 N. W. 133), and that the action is one in *assumpsit* rather than one in trover. If when the plaintiff “had completed the introduction of her testimony” there was sufficient evidence to show an actual conversion of the property, and if there was sufficient evidence to sustain every other fact necessary to be proved by her, then the motion for a nonsuit was improperly allowed, if it was granted on the ground that the plaintiff had failed to allege and prove a demand upon the defendant for a surrender of the property, because such a demand was not necessary. But how can we know whether there was evidence showing an actual conversion? It may be that the defendant removed the building rightfully and in such a manner as not to have produced a liability either in conversion or *assumpsit* for the value of the property. The answer does not assert ownership in the defendant, nor does the corporation

aver that the plaintiff is not entitled to the property; but, on the contrary, it is alleged in the answer that delivery of the property will be made to the plaintiff if she is the owner of it. The admissions in the answer plus the affirmative allegations found in it do not, as a matter of law, necessarily amount to a conversion. If there was no actual conversion of the property, then it was necessary for the plaintiff to allege and prove a demand and refusal to surrender; and there are no admissions or allegations in the answer which relieve the plaintiff from this obligation.

5, 6. Even though we assume, without deciding, that as held in *Flynn v. Dougherty*, 91 Cal. 669 (27 Pac. 1080, 14 L. R. A. 230), "a nonsuit cannot stand unless the ground upon which it is supported was called to the attention of the court and the plaintiffs at the time the motion was made," and if we also assume, without deciding, that the court cannot allow a motion for a nonsuit on a ground not specified in the motion unless the court expressly calls the attention of the plaintiff to such ground, and even though we also assume that the court did in fact allow the motion on the ground that the plaintiff failed to allege and prove a demand, nevertheless we are obliged to affirm the judgment appealed from, for the reason that there is neither a bill of exceptions nor a transcript of any part of the evidence offered at the trial: See *Ferguson v. Ingle*, 38 Or. 43, 44 (62 Pac. 760); *Hammer v. Campbell Gas Burner Co.*, 74 Or. 126, 132 (144 Pac. 396); *Culver v. Van Valkenburgh*, 60 Or. 447, 450 (119 Pac. 753); *Armsby v. Grays Harbor Commercial Co.*, 62 Or. 173, 185 (123 Pac. 32); 9 R. C. L. 204; 18 C. J. 1197; 14 Ency. Pl. & Pr. 119.

Since it cannot be said, as a matter of law, from an inspection of the pleadings that the defendant con-

verted the property to its own use, then it was necessary for the plaintiff to prove a conversion. If the acts of the defendant, independent of any demand for the surrender of the property, did not amount to a conversion, then to have produced a conversion it was necessary for the plaintiff to have demanded a surrender of the property, and this must have been followed by a refusal. Now, it may be that the evidence failed to show such acts and conduct as would, without a demand and a refusal, produce a conversion; and hence in that event averment and proof of a demand and a refusal became necessary, and if such were the case the ruling of the trial court was correct. Error in the court's ruling is not presumed. Error must affirmatively appear before a ruling on a motion for a nonsuit will be disturbed. It is impossible for the appellate court to determine whether the trial court ruled correctly or erroneously, unless we can first examine the evidence offered at the trial: *Adkins v. Monmouth*, 41 Or. 266 (68 Pac. 737); *Goodale Lumber Co. v. Shaw*, 41 Or. 544, 546 (69 Pac. 546).

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and JOHNS, JJ., concur.

Argued January 7, affirmed February 17, rehearing denied March 16, 1920.

SCHIFFMANN v. YOUMANS.*

(187 Pac. 630.)

Injunction—Equity will Enjoin Wrongful Cutting of Standing Timber Forming Principal Value of Property.

1. Equity will intervene to prevent the cutting of standing timber when such timber constitutes the principal value of the estate, for in the very nature of things an action for damages to recover the value of the timber cut, or treble damages, is an adequate remedy.

[As to injunction to prevent injury to trees or timber, see note in 11 Ann. Cas. 456.]

Injunction—Action to Enjoin Cutting of Timber may be Maintained Though Boundary Line was Disputed.

2. While a suit to enjoin a trespass cannot be used to determine the location of a disputed boundary, nevertheless a suit to enjoin the cutting of standing timber which was the principal value of an estate may be maintained where defendants made a dispute over the boundary the pretext for removing the timber.

Boundaries—Sufficiency of Evidence to Establish.

3. In a suit to enjoin the cutting of timber, evidence held to establish the boundary as claimed by plaintiff and not to show defendants' title to the land in dispute.

Adverse Possession—Piling of Brush to Stop Cattle not Such Possession as will Ripen into Adverse Title.

4. Though defendants piled brush and made a sort of a temporary fence to stop cattle, they cannot be deemed in possession of the land up to the fence which was a temporary structure, so that they would acquire an adverse title, as plaintiff could not have maintained ejectment against them on account of the construction of such fence.

Boundaries—Monuments Control Courses and Distances.

5. Monuments will control courses and distances in construing a deed.

Costs—Allowance on Appeal Denied in View of Oppressive Conduct.

6. Where plaintiff's conduct was oppressive and unneighborly, the appellate court may refuse to allow him costs and disbursements on appeal, even though affirming the decree in his favor.

*The question of injunction against trespass to cut timber is discussed in notes in 22 L. R. A. 233; 43 L. R. A. (N. S.) 262.

On right to injunction against cutting trees on or over boundary line, see note in 46 L. R. A. (N. S.) 5.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 1.

This is a suit begun to enjoin the cutting and taking away of timber upon premises alleged to belong to plaintiff.

The complaint alleges that plaintiff is the owner of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 6, T. 2 N., R. 9 W. in Tillamook County; that the same is timber land, covered with a heavy growth of valuable timber, and that the spruce timber thereon is of the value of \$4,000; that on or about the — day of January, 1918, the defendants, acting together and in pursuit of their partnership business, wrongfully and unlawfully entered upon the aforesaid lands of the plaintiff and began to cut and remove the merchantable timber growing and being thereon, and that defendants ever since have continued to conduct and carry on operations upon said lands, and in so doing the defendants have cut and removed a large quantity of said merchantable timber from said real property, the exact amount thereof the plaintiff is not able to state, but plaintiff is informed and believes, and therefore alleges, the amount of said timber so cut and removed is approximately 100,000 feet of spruce timber of the reasonable value of \$2,000; that defendants are continuing to cut and remove timber from said premises without any license, permission, or authority so to do, and wrongfully and unlawfully threaten to continue to cut and remove timber therefrom, and unless they are restrained from so doing will continue to cut and remove said timber until they remove the whole thereof, all in denial of the plaintiff's right thereto and without plaintiff's consent or permission; that unless the defendants are restrained from doing the

acts aforesaid they will remove all of said timber, and the value of said lands will be thereby greatly diminished and the same will be rendered practically worthless; that, by the doing of the wrongful and unlawful acts herein mentioned, the defendants have rendered plaintiff's land less valuable, and plaintiff has been damaged by reason thereof, including the removal of said timber and the value thereof, in the sum of \$2,500; and that the value of said lands consists principally in the value of the timber thereon, and the plaintiff has been, and by continuance of the aforesaid wrongful and unlawful acts of defendants will be, irreparably injured.

A general demurrer was interposed, which, being overruled, the defendants answered, denying, upon information and belief, plaintiff's ownership of the land described in the complaint, and generally denying all the allegations of the complaint.

For a separate defense it was alleged that Daniel Hickey, on or about the fifteenth day of June, 1892, procured a patent from the United States government for the N. E. quarter of the N. W. quarter, and lot 1 of section 7, and lots 6 and 7 in section 6, T. 2 N., R. 9 W., W. M., Tillamook County, Oregon, and immediately thereafter went into the open, notorious, exclusive and adverse possession of said property and the whole thereof, and continued in such open, notorious, exclusive and adverse possession of said property during all the time he owned said property; that thereafter, for a valuable consideration, he granted, bargained and sold to the defendant, Sarah E. Hickey, all his right, title and interest in and to said property, and every part thereof; that said defendant, Sarah E. Hickey, entered into the open, notorious, exclusive and adverse possession of said

property immediately upon the receipt of said conveyance and has ever since been and now is in the open, notorious, exclusive and adverse possession of said property, claiming to own the same and the whole thereof, and the defendant, Sarah E. Hickey, and her grantor, Daniel Hickey, have been in the open, notorious, exclusive and adverse possession of said property, and the whole thereof, claiming to own the same for more than ten years last past, and the defendants, Youmans and Thomas, are the tenants of said Sarah E. Hickey, in possession of said property, holding the same as such tenants, and all the timber that said Youmans and Thomas have cut has been off from the land aforesaid and the plaintiff has no right, title or interest therein or any portion thereof; and that the plaintiff has not been in the possession of said property, or any portion thereof, for ten years last past.

Plaintiff replied and alleged, among other things, that the north line of section 7, township 2 north, range 9 west, W. M., which is the same as the south line of section 6 in said township and range, is an irregular line; that the quarter-section corner between said sections is located at a point 43.69 chains east and 24.72 chains south of the southwest corner of said section 6, so that the north boundary of the northwest quarter of said section 7, is a line described as beginning at the southwest corner of said section 6 —, being the northwest corner of said section 7 —, and running thence south $60^{\circ} 30''$ east, 50.20 chains, to the aforesaid quarter-section corner common to said sections 6 and 7; that the lands of plaintiff, described as the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of said section 6, are bounded on the south by the eastern part of the north line of said N. W. $\frac{1}{4}$ of said section 7; that plaintiff's said lands have a width east and west of 84 rods, and the lands of plaintiff, upon

which defendants have committed the acts complained of in the complaint herein, are those portions of plaintiff's said lands lying between the southern boundary thereof, and the easterly 84 rods of a line described as beginning at the southwest corner of said section 6, and running thence north, $89^{\circ} 43''$ east, 43.69 chains; and that plaintiff's said lands are, and at all the times mentioned in the pleadings herein, have been unclosed and uninhabited, and not in the actual possession of any person other than plaintiff and those under whom he claims, save and except for the wrongful possession thereof during the present year, as alleged in the complaint herein.

Upon the trial the court found for the plaintiff generally, and found that the quarter-section corner on the line between sections 6 and 7, township 2 north, range 9 west, which is the southeast corner of the above-described parcel of land, is located at a point 43.69 chains east and 24.71 chains south of the southwest corner of said section 6, which southwest corner is the corner common to sections 6 and 7, township 2 north, range 9 west; that the south boundary of said land of plaintiff is formed by the last portion of a line which begins at the southwest corner of said section 6, and runs thence south, $60^{\circ} 30''$ east, 50.20 chains to said quarter-section corner; and that plaintiff's said lands have a due east and west width of 84 rods.

The court found against the defendants' plea of adverse possession, and that the value of the timber cut and removed was \$578.26, and as conclusions of law, found that plaintiff was entitled to possession of the disputed strip; that defendants should be enjoined from entering upon or cutting the timber thereon; and that plaintiff should recover from defendants the sum of \$578.26, the value of timber already cut and re-

dence are so incomplete as to render the task of identifying stakes and lines indicated in the testimony, very difficult. So much so that the writer has been compelled to compile from the testimony, as best he could, a map of the various locations therein referred to; but, after a careful examination of the testimony, we are fully satisfied that the monument set by the government surveyor for the southeast corner of section 6 and the northeast corner of section 7, was placed at a considerable distance south of where an east and west line running between sections 6 and 7 would locate it, thus increasing the area of section 6 at the expense of section 7.

5. The true boundary of sections 6 and 7, so far as the tract in dispute is concerned, is, therefore, a straight line between the quarter-section corner found and identified by plaintiff's witness Sappington, and the southwest corner of section 6, the location of which is conceded by all parties. This places the line between plaintiff and defendant Hickey as fixed by the court, and as monuments control courses and distances we are forced to agree with that finding.

We think the defendant's evidence of adverse possession is not sufficient to constitute a defense on that ground. Hickey testified that he built a fence on the east line of the northwest quarter of section 6, the north end of which terminated at a point where he now claims the quarter post was located, and that at the latter point he erected a pair of bars. The fence seems to have been mostly constructed of brush and logs with some rails and was intended, he says, to prevent the cattle of his neighbors east of him from straying over on his premises and to prevent his own cattle from straying to the eastward. This fence, he says, was in existence for ten or fifteen years, but

has now disappeared with the exception of a few strips nailed on a supposed witness tree, which indicate that a pair of bars once existed there.

The fence was evidently a temporary affair, was not on any line, or supposed line, between plaintiff and defendant and inclosed no land. There has never been a time when plaintiff could have maintained ejectment for possession of the disputed strip by reason of the erection of this fence. Neither can the occupancy of part of the land embraced in his patent avail him here, because the field-notes call for monuments, and these calls being imported into the patent the holding must be construed with reference to the monuments as they actually existed on the ground, rather than to the courses and distances therein mentioned.

6. This leads to an affirmance of the decree of the Circuit Court. It is fair to say that we do this only because the law compels us to adjudicate the legal rather than the moral rights of the litigants. We award plaintiff the timber on the disputed strip because the law awards it to him, and we have no discretion to set aside the law, but, considered from the standpoint of the Golden Rule, plaintiff's conduct is oppressive and unneighborly and does not meet with our approbation.

There is one matter in which we have discretion, and that is in the matter of awarding him costs, and while we affirm the decree as to the injunction and the damages allowed by the Circuit Court, the plaintiff will not recover any costs or disbursements on this appeal.

AFFIRMED. REHEARING DENIED.

BURNETT, BENSON and HARRIS, JJ., concur.

Argued January 7, affirmed February 17, rehearing denied March 16, 1920.

IN RE NORTH UNIT IRR. DISTRICT.

GARD v. HENDERSON.

(187 Pac. 839.)

Constitutional Law—Waters and Watercourses—Limiting Right to Vote on Issuing Bonds of Irrigation District not a Deprivation of Privileges.

1. Laws of 1917, page 762, Section 29, relating to the issuance of bonds by an irrigation district, and allowing every owner of one acre of land or more to vote, is not invalid as violating Article I, Section 20, of the Constitution, and Section 1, of the 14th Amendment of U. S. Constitution, as depriving smaller land owners of equal privileges and immunities.

Newspapers—Publication Affidavit Sufficient, Though Merely Alleging Newspaper was One of General Circulation.

2. An affidavit, setting forth publication of notice of an election to issue bonds of an irrigation district, which was in the form used under Section 58, L. O. L., prior to the enactment of Laws of 1917, page 461, defining the term "newspaper" and declaring that it shall apply only to papers containing certain amount of printed matter, and having a specified number of subscribers, is sufficient, though it merely alleged that the newspaper was one of general circulation.

Waters and Watercourses—Affidavit of Publication of Notice of Issuance of Irrigation District Bonds Sufficient, Though Failing to State Amount of Publication Charge.

3. Though Laws of 1919, page 11, fixing legal charges for the publication of notice and summons, declares that affidavits of proof of publication shall state the amount of the charges, the purpose of the act was merely to prevent overcharge, and an affidavit of notice of publication of an election for the issuance of irrigation bonds is not invalid because it failed to state the amount paid the publisher, the act authorizing the issuance of bonds providing that no irregularity which did not injuriously affect the rights of the parties shall be regarded.

From Jefferson: T. E. J. DUFFY, Judge.

Department 2.

This is a proceeding brought by the directors of the North Unit Irrigation District in Jefferson County, under the provisions of Chapter 357 of the Laws of 1917, to procure a confirmation of an election,

authorizing the issuance of irrigation bonds of that district, to the amount of \$5,000,000 (five million dollars). The organization of this district was before this court and the organization of the district held valid in *Links v. Anderson*, 85 Or. 508 (168 Pac. 605, 1182).

After organization, an election was held and bonds were voted to the same amount as in the present proceeding. That election was contested and was before this court in *Gard v. Peck*, 91 Or. 33 (178 Pac. 190), where it was declared invalid by the decree of this court, upon the ground that the notice of election had not been published for the time required by the statute.

After that decision the directors proceeded to call a second election, at which the bonds were again authorized by a vote of 236 to 100.

This proceeding was then brought by the directors, in the Circuit Court for Jefferson County, to have the proceedings confirmed. The appellants appeared at the hearing and protested the proceeding. There was an order and decree confirming the election and authorizing the issuance of the bonds, from which the protestants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. W. P. Myers*.

For respondents there was a brief over the names of *Mr. Lewis H. Irving*, *Mr. John K. Kollock* and *Mr. W. H. Wilson*, with oral arguments by *Mr. Irving* and *Mr. Kollock*.

BENNETT, J.—There are only two questions presented by the brief of appellant. First: Is the act of the 1917 legislature, authorizing these bonds, and es-

pecially Section 29 of the same, fixing the qualification of voters, constitutional? Second: Were the proofs of publication of the notice of election sufficient?

1. The above section provides:

“Section 29. *Qualification of Voters.* The term ‘owner of land,’ or ‘elector’ used in this Act, shall include every person, male or female, over the age of twenty-one years, whether a resident of the district or state or not, who is a *bona fide* owner of one acre or more of land situate within the district and whose name appears on the last assessment roll, or who is the holder of an uncompleted title or contract to purchase State or Carey Act lands. Entry-men upon public lands of the United States shall be considered as landowners for the purpose of this Act, and shall be qualified petitioners for the organization of an irrigation district, and shall share all the privileges and obligations of landowners within the district, including the right to vote or hold office, subject to the terms of the Act of Congress entitled ‘An Act to promote reclamation of arid lands,’ approved August 11, 1916.

“Any corporation shall be entitled to vote as a single land owner through any officer or agent duly authorized in writing under the seal of the corporation. Any guardian, administrator or executor authorized to act as such of a person or estate owning land within the district shall be considered a land owner for the purposes of this Act, where the owner in fee is not otherwise entitled to vote.”

It is urged that the above provision, disqualifying the small land owner, who owns less than an acre of land, is in conflict with Article I, Section 20 of the Constitution of the State of Oregon, providing that—

“No law shall be passed granting to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens,” and Article XIV, Section 1 of the Constitution of the United States, containing a similar provision.

Similar laws have always been upon the statute books of nearly all the states, and have never been held to be in violation of similar constitutional provisions. Their constitutionality in this regard was fully upheld by the Supreme Court of the United States in *Minor v. Happersett*, 21 Wall. 162 (22 L. Ed. 627, see, also, Rose's U. S. Notes), in which it is pointed out that at the very time of the adoption of the federal Constitution nearly every state had limited the right to vote to taxpayers, and in many of the states the voter had to own land of a certain value. In Maryland and North and South Carolina, the freehold must have amounted to at least fifty acres. In our own state, it has been directly held that in the matter of road district (as well as school districts), the legislature may make the ownership of real property a qualification for the right to vote: *Oregon Timber Co. v. Coos County*, 71 Or. 462 (142 Pac. 575); *Beirl v. Columbia County*, 73 Or. 107 (144 Pac. 457). There is no difference in principle; and it is clear that the provision in this act, that the ownership of as much as an acre of land was a necessary qualification of the right to vote, was not a violation of the constitutional provision referred to. There was some doubt at one time as to whether such qualifications of the right to vote in this class of elections might not be in conflict with Article II, Section 2 of the state Constitution, providing for the qualifications of voters at elections; but this doubt has been resolved by the decisions of this court in the cases of *Oregon Timber Co. v. Coos County*, 71 Or. 462 (142 Pac. 575), and *Beirl v. Columbia County*, 73 Or. 107 (144 Pac. 457), already referred to. This very law has been frequently before the courts, in this and other proceedings, and has been tacitly upheld: *Links v. Anderson*, 85 Or. 508 (168 Pac.

cation. Chapter 2 of the Laws of 1919 provides, at some length and in considerable detail, what shall be the legal charges for the publication of notices and summons and then proceeds,—

“In all counties in this state affidavits of proof of publication by newspapers for the publication of any legal notice, summons, citation, notice of sheriff’s sale, or other legal advertisement, shall include, in addition to the matters now required, the amount of charge actually made and to be collected by such newspaper for such publication.”

The affidavit in this case was as follows:

“I, Lot C. Pearce, being first duly sworn depose and say that I am the printer of the Madras Pioneer, a weekly newspaper, having a general circulation, printed and published at Madras, Jefferson County, state of Oregon. That a notice, printed copy of which is attached hereto and made a part of this affidavit, was printed and published once a week for four consecutive weeks in the regular and entire edition of said newspaper, and not in any supplement thereof, commencing with the issue dated February 13, 1919, and ending with the issue dated March 13, 1919.

“That the fee actually charged for said publication is \$ —.

“LOT C. PEARCE.

“Subscribed and sworn to before me this 15th day of March, 1919.

“(Notarial Seal)

VINE W. PEARCE,

“Notary Public for Oregon.

“My commission expires April 20, 1921.”

If we assume that a fee was actually charged in this case, then there was an omission to state the amount. It is apparent that the purpose of Chapter 2 of the Laws of 1919, already referred to, was to prevent the charging of exorbitant fees. The failure to state the amount charged cannot affect the extent or sufficiency

of the notice to interested parties. Subdivision F of Section 41 of the act authorizing the issuance of such bonds, provides:

“The court hearing any of the contests provided for by this Act, or any inquiry into the legality or correctness of any of the proceedings herein provided for, must disregard any error, irregularity, informality or omission which does not injuriously affect the substantial rights of the parties to said proceedings.”

We do not think the failure to insert the amount of fees in the affidavit of publication was a fatal omission under this act.

It follows that the judgment of the court below should be affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued February 11, affirmed March 16, 1920.

TRUEBLOOD v. TALKINGTON.

(188 Pac. 159.)

Appeal and Error—Conclusion of Trial Judge as to Weight of Testimony of Great Importance.

1. Conclusion by trial judge, in equity, who heard the witnesses and had opportunity to observe their demeanor, as to the weight of testimony, is of great importance.

From Polk: **HARRY H. BELT, Judge.**

Department 2.

This is a suit to foreclose a thresherman's lien. A decree was rendered in favor of plaintiff for a balance of \$65.12. Defendant J. B. Talkington appeals. The issues involved are as follows: Plaintiff alleges that

the reasonable value of threshing a certain crop of grain in August, 1918, is \$100.

Defendants aver that the work was to be done by plaintiff for defendant Talkington at an agreed price of twenty-five cents per sack or \$46.75. There is also a difference between the parties of \$1.50 per day for seven and three-fourths days' labor of defendant Talkington with his team performed for plaintiff. The grain was gathered from four fields and hauled by plaintiff to one setting near defendant Talkington's barn. The work of moving the outfit to the place and threshing the grain consumed about eight and one-half hours' time. Twenty men and nine teams were employed in the operation.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. A. G. Thompson*.

For respondent there was a brief and an oral argument by *Mr. Oscar Hayter*.

BEAN, J.—We concur in the finding of the learned trial judge, that the services were reasonably worth the sum of \$100, and that after deducting the reasonable value of defendant Talkington's labor there was due plaintiff the amount decreed. It appears by a preponderance of the evidence that, owing to conditions prevailing that season, no uniform charges for threshing per sack or bushel could safely be made; that no specific agreement was made by the parties as to price; and that the amount claimed by plaintiff was reasonable.

The trial judge heard the witnesses, and had an opportunity to observe their demeanor on the stand,

and his conclusion as to the weight of the testimony is of great importance.

The decree of the lower court is affirmed.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued February 24, affirmed March 16, 1920.

WEST v. MARION COUNTY.*

(188 Pac. 184.)

Counties—Claim for Injuries from Defective Highway not Required Before Suit.

1. An action for damages for injuries from defective highway can be brought against county without first presenting claim for damages to county court; the presentation of such claim being unnecessary where the controversy is over a tort.

Highways—Whether Automobile Driver had Obtained License Held Jury Question.

2. In action against county for injuries to automobile driver from defective highway, question as to whether driver had obtained the license required by Section 6375, L. O. L., held for jury.

Highways—Accident Subsequent to One in Which Plaintiff was Injured Inadmissible.

3. In automobile driver's action for injuries from defective highway, evidence of another accident at a period long after the occurrence of the accident in which the plaintiff had been injured was not admissible for the purpose of showing notice of defect to defendant county, or for any purpose.

Highways—Evidence of Condition of Road at a Time Subsequent to Accident Held Admissible.

4. In action for injuries from defective highway, evidence as to condition of road a year subsequent to the occurrence of the accident was admissible upon a showing that the condition of the road had not changed during the year.

*Authorities passing on the question as to nonobservance of public regulations by one using highway or bridge as affecting recovery for damages caused by obstruction or defect therein are collated in a note in 42 L. B. A. (N. S.) 1035.

On admissibility of evidence of condition of highway before and after accident, see note in 32 L. B. A. (N. S.) 1104.

On effect of operating automobile upon highway without a license, see notes in 25 L. B. A. (N. S.) 561; 25 L. B. A. (N. S.) 734; 35 L. B. A. (N. S.) 699; 41 L. B. A. (N. S.) 307; 52 L. B. A. (N. S.) 801; L. B. A. 1915D, 628; L. B. A. 1916E, 1225.

REPORTER.

Trial—Refusal of Requested Instruction on Proximate Cause not Reversible Error, Where Same Point was Covered by Other Instruction.

5. In action against county for injuries to automobile driver from defective highway, sustained after driver had turned from highway upon approaching automobile coming from opposite direction, refusal to give defendant's requested instruction as to its non-liability if the proximate cause of the accident was the negligence of driver of other automobile in failing to have automobile lights properly dimmed *held* not ground for reversal, in view of other instruction given covering substantially same ground.

Highways—County Liable Where Defective Road Contributing Cause of Accident.

6. If automobile driver was blinded by lights of approaching car and was injured in swerving from road because of road's defective condition, county was liable notwithstanding negligence of driver of other automobile, since the defect in the road was one of the contributing causes of the accident.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 2.

This is an action against the county to recover damages for injuries resulting to the person of the plaintiff, and to his automobile, caused by the car leaving the road and turning over. The plaintiff claims the injury was caused in whole or in part by the defective and dangerous condition of the road.

The road, where the accident occurred, was near the town of Gervais at a point where the road leading from Oregon City to Salem crossed a gulch or canyon. There was a culvert at the bottom of the gulch over which the road passed, and the approach to this culvert was upon a fill.

The evidence for the plaintiff tended to show that this fill, at the point where the car ran off, was about seven or eight feet above the level, and that the top of the fill, or roadbed, at this point was about 16 or 17 feet wide, having narrowed down from a greater width at a point further back from the culvert. There was no rail or guard along the sides. There was some evidence that there was a slight turn in the road to the left going south, at or about the point in question.

It was Fair time, and the plaintiff was driving on the road from Oregon City toward Salem. It was dark, and when the plaintiff reached the fill in question, he met a number of automobiles coming from the Fair. Several of these had their lights lit, and one in particular did not dim its lights, and the reflection in plaintiff's eyes blinded him so he could not see the road. Under these conditions he got too far to the right, and his car ran off the grade and down the bank, causing the injuries complained of. Plaintiff brought this action to recover general and special damages in the aggregate amount of \$1950. There was a verdict and judgment in his favor for the sum of \$626.80, from which the defendant appeals.

The appellant claims the judgment should be reversed:

First: because there was no evidence that the claim for damages had been submitted to the County Court before the action was brought.

Second: the appellant claims there was no sufficient proof that plaintiff had obtained a license and was lawfully traveling on the highway.

Third: appellant claims that evidence of another accident at the same place after the main occurrence was erroneously admitted.

Fourth: there was error in refusing an instruction as to the liability of the defendant when the accident was caused by the negligence of a third party.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Max Gehlhar*, District Attorney, and *Mr. James G. Heltzel*, with an oral argument by *Mr. Gehlhar*.

For respondent there was a brief over the name of *Messrs. Cleeton & McMenamin*, with an oral argument by *Mr. T. J. Cleeton*.

BENNETT, J.—Appellant claims that before an action can be commenced against a county on any kind of a claim, the same must first be presented to the County Court, and, as there is no evidence that this claim was so presented, the motion of the defendant for a nonsuit and directed verdict should have been allowed.

This question seems never to have been passed upon directly by this court, in a case where the action was for damages resulting from a tort, and against a county.

The appellant relies upon the cases of *Union County v. Slocum*, 16 Or. 237 (17 Pac. 876), and *Wallowa County v. Oakes*, 46 Or. 33 (78 Pac. 892), both of which were based upon claims against the county for services rendered.

In the *Slocum* case the plaintiff had commenced an action in the Justice's Court to recover for the alleged value of his services in reporting testimony at the request of the committing magistrate. There was a writ of review, and in passing upon the same Mr. Justice THAYER, delivering the opinion of the court, said:

“The facts recited in the complaint did not constitute a cause of action. The services of the respondent alleged therein to have been rendered created no claim against the county of Union, and if it had, the respondent could not have maintained an action thereon without presenting his account therefor to the County Court of said county for audit and allowance.”

In *Wallowa County v. Oakes*, 46 Or. 33 (78 Pac. 892), the plaintiff was seeking to recover his fees as a magistrate, in a criminal case. After holding that a justice of the peace is entitled to recover such fees, the court said:

“This brings us to a consideration of the question whether or not an action at law can be maintained

against a county to recover a compensation which the law has prescribed for the performance of an official duty. It must be admitted that, as a condition precedent to the right to maintain such action, the claim of the officer for the fees earned must have been presented to and rejected by the County Court sitting as a board of county commissioners for the transaction": Citing *Union County v. Slocum*, 16 Or. 237 (17 Pac. 876).

In neither of these cases is there anything to disclose upon what reasoning the conclusion of the court was based, and in neither was there any citation of authorities.

The attorneys for the plaintiff, on the other hand, allege a distinction between such cases, where the claim is upon an implied contract, and cases where a claim is based upon a tort, as in this case, and rely upon *Sheridan v. City of Salem*, 14 Or. 328 (12 Pac. 925); *Caviness v. City of Vale*, 86 Or. 554 (169 Pac. 95), and *Colby v. Portland*, 89 Or. 556 (174 Pac. 1159, 3 A. L. R. 819). In none of these cases was the county a party defendant, but the reasoning seems to be applicable to a case against a county.

Sheridan v. City of Salem, 14 Or. 328 (12 Pac. 925) was an action against the City of Salem for injuries caused by a defective walk. There was a provision in the city charter that—

"No claim against the city shall be paid until it is audited and allowed by the common council, and then the treasurer shall pay it upon a warrant drawn upon him by the recorder."

The court said:

"We do not think that these provisions were intended to apply to a claim of this character. * * All claims arising out of the ordinary expenditures of the city are required to be presented to the common council for allowance, before an action can be maintained thereon. But that arises out of a relation the claimant sustains

to the city, created by an employment or contract of some character. Thus, a person who performs service or does something for the city at its request, for which compensation is to be made, tacitly agrees that he will present his claim to the common council for audit and allowance. That is the only mode by which the city can pay him. * * But in cases of tort, the action is for damages, and the party injured is under no more obligation to present the claim to the corporation, than he would be to a private person who had done him a wrong. The reason of the rule only applies to the former class of claims, and not to the latter, and has no application whatever to them."

In *Caviness v. City of Vale*, 86 Or. 554 (169 Pac. 95), the Sheridan case was cited with approval, and it was held that the provision of the city charter, requiring claims against the city to be audited and allowed by the common council, before they were paid, "Did not apply to claims arising *ex delicto*."

In *Colby v. Portland*, 89 Or. 566 (174 Pac. 1159, 3 A. L. R. 819), the two previous cases were again reaffirmed, the court saying:

"We adhere to the conclusion reached in that case by the Chief Justice. We do not believe that this section was ever intended by the framers of the charter to apply to actions *ex delicto*."

If a claim for a tort does not have to be presented to the city council, notwithstanding a provision that "no claim shall be paid until it is audited and allowed by the common council," we think we would not be justified, in attempting to make a distinction between claims against the city, and claims against the county, for tort, where there is absolutely no provision in the law requiring a claim against the county to be submitted to the County Court.

1. Upon the authority of these cases we therefore hold, that where the controversy is over a tort, it is

not necessary that the claim be presented to the County Court before an action can be brought.

The next contention of appellant is, that there was no sufficient proof that the plaintiff had obtained an automobile license and was in this respect lawfully traveling upon the road.

Section 6375, L. O. L., provides:

“Whenever any individual, *while lawfully traveling* upon any highway of this state or bridge upon such highway, the same being a legal county road, shall, without contributory negligence on his part, and without knowledge upon his part of the defect or danger, sustain any loss, damage, or injury in consequence of the defective and dangerous character of such highway or bridge, either to his person or property, he shall be entitled to recover of the county in which such loss, damage, or injury occurred, compensatory damages, not to exceed the sum of \$2,000 in any case by an action in the Circuit Court of such county, or in a Justice’s Court therein, if the amount of damages sued for shall not exceed the sum of \$250.”

There seems to be some conflict in the authorities as to whether provisions like this in statutes apply in remote matters, like obtaining a license or unlawfully traveling on Sunday, which are not directly connected in any way with the cause of the accident, or as to whether they are only intended to apply where the unlawfulness refers to the manner of traveling, and has some connection with the cause of the injury.

The only cases in this court, in which the foregoing section seems to have been construed, were cases where the unlawfulness complained of had a direct connection with the occurrence.

In *Jones v. Union County*, 63 Or. 566 (127 Pac. 781, 42 L. R. A. (N. S.) 1035), the injury to the plaintiff occurred while he was attempting to cross a bridge on the public highway without having first laid planks,

as required by Section 6337, L. O. L. The court considered the authorities, permitting a plaintiff to recover where he was traveling without a license, etc., but does not seem to pass upon that question, stating the grounds of its decision as follows:

“Under the legal principle thus announced, if the statute adverted to is valid, it follows that when the plaintiff’s husband undertook to guide the traction engine over the bridge, without using any plank, as required by Section 6337, L. O. L., he was not ‘lawfully’ traveling upon the highway, and this action cannot be maintained.”

To the same effect is *Bailey v. Benton County*, 61 Or. 390 (111 Pac. 376, 122 Pac. 755).

In both of these cases, and also in the case of *Buttel v. Douglas County*, 87 Or. 105 (168 Pac. 1180), the court reiterates the general principle declared by the statute, that—

“Under this legislative enactment it is incumbent upon the plaintiff before he can recover for an injury caused by a defective and dangerous condition of a county highway to prove that he was lawfully traveling thereon; that he was injured by reason of a defect therein; that his own negligence did not contribute to such injury, and that he had no knowledge of the defect or dangerous condition.”

2. Assuming, however, but not deciding, that a person must have obtained a license for his automobile before he can recover from the county under the statute, for injuries occurring while he was traveling in such automobile; we think the evidence in this case was sufficient to carry the case to the jury in that regard, and to justify the jury, in the absence of any showing to the contrary, in finding that he had obtained a license and complied with the law, and was therefore within the terms of the statute.

The appellant also claims that there was error in the rulings of the court below, in relation to the evidence of one Sanborn. The witness having testified that he traveled over the road, about a year after the accident in which the plaintiff was injured; the following evidence, colloquy and rulings occurred:

"A. This year, 1918. We got down there at 10:30 in the morning, and we were driving down this hill, and across this particular fill, when there was a noise of some sort—what caused it we don't know—but immediately the car took right off the side of this fill.

"Mr. Gehlhar: If the court please, may I ask a question?

"Court: Yes.

"Mr. Gehlhar: When did this happen?

"A. The Sunday before, or the second Sunday before Labor Day.

"Court: 1918, this year?

"Yes, sir.

"Mr. Gehlhar: That has no connection with the case. There is a year between. I move to have it stricken out.

"Court: If he can connect up the fact that the road is in the same condition now as then—

"Mr. Gehlhar: (Interrupting.) I save an exception.

"Court: Only that part as to his observation of the road, however. There is nothing else that would be admissible in this case. The answer to the question is that he was traveling toward Salem the Sunday before, or the second Sunday before Labor Day, 1918.

"Q. Now, did you observe the road there at that point?

"A. Yes, sir.

"Q. The character of the road?

"A. Yes, sir.

"Mr. Cleeton: I want to offer to prove by this witness something that I don't care to speak out before the jury, but I can come with counsel to the court's desk and make my offer. [Does so.] Assuming this road is in the same condition, I want to show that this

man himself ran over the grade just at the same point and broke up his car and injured his wife and child. That on the ground that the road actually is dangerous. It is going to the question as to whether or not that is a dangerous place in the road. Accidents have happened before and since, and, if the road is in the same condition, it is a matter—

“Court: (Interrupting.) That would be a collateral issue which we would have to try the whole matter out to find out whether it was through his carelessness before the jury could say whether it was caused by the defective or dangerous condition. That whole question would have to be tried out.”

3. It is entirely clear that the evidence of another accident at a period long after the occurrence in question was not admissible for the purpose of showing notice, or for any purpose, but we do not understand that the court ruled that it was admissible—on the contrary, it seems clear that the court did not, but intended to and did exclude the evidence in question, in so far as it applied to any accident, at the later date. There is no claim that the condition of the road had changed in any regard. In fact, the testimony tended to show that it was in the same condition.

4. Under these circumstances the testimony of the witness, as to the width of the road and the height of the grade, etc., was competent, and this seems to have been the only portion of his testimony admitted by the court. We think there was no error in this regard.

The only other question discussed in the brief of appellant, is the claim that the court erred in refusing instruction No. 8, asked by appellant, which was as follows:

“If you find that the accident and injury of plaintiff was caused solely by the negligence of the driver of the machine which was coming north on the highway, in that he failed to properly dim his lights, thereby blind-

ing the vision of the plaintiff and causing him to drive off the embankment, then you must find for the defendant. In other words, Marion County is not liable for injuries caused directly by the negligence of other drivers. But if, in addition to that, there was a defect also in the highway, which contributed to the accident which caused the injury, then he should recover; the other elements that I have just described to you being also proven, that is, that he was without contributory negligence, and had no knowledge of the defect and was lawfully traveling on the highway."

The court refused this upon the ground that it was already covered by the general instructions. The instruction of the court in relation to this matter, was as follows:

"There is another element in this case; He alleges that he was coming down the hill and another automobile turned its flash light in his eyes thereby blinding him and stunning him for the time being so that he was unable to see. And you have a right to take that into consideration. If the proximate cause was the blinding, caused by the other man, then the other man would be responsible, if the county was free from negligence, or if there were no defects or dangers in the highway."

5. The instruction asked for by the defendant was carefully prepared, and was fair and reasonable, and we see no reason why the court should not have given it, as requested.

It is the opinion of this court, however, that the instruction given by the court below upon this question, substantially covered the instruction asked for—indeed, in some respects it was stronger for the defendant than the instruction requested. We think the jury could not have failed to understand from the instruction that if the sole, or even the proximate cause of the accident, was the act of the man in the other car,

in not turning down his lights, that the plaintiff could not recover.

6. Besides, the question as to whether or not the highway was defective and dangerous, as alleged by the plaintiff, at the point in question, was squarely submitted to the jury, and it must have found that it was. The undisputed evidence showed that the plaintiff's car actually did run off the grade at this point, and if there was a defective and dangerous condition, in the narrowing of the grade and the failure to provide a guard-rail, as alleged in the complaint, there is no room to question that such defective and dangerous condition did contribute to the injury. In other words, there is an undisputed physical demonstration that the narrowness of the grade at that point, and the absence of a guard-rail, was, in a measure, one of the contributing causes of the accident.

There are two other instructions which were requested by the defendant and refused by the court, which are assigned as error. Neither of them are discussed in the brief of appellant. However, we have examined them and are of the opinion that they were fully covered by the general charge.

The judgment of the court below is affirmed.

AFFIRMED.

BENSON, BEAN and JOHNS, JJ., concur.

Argued February 17, reversed and remanded March 16, 1920.

WENTWORTH v. WINTON CO.

(188 Pac. 204.)

Principal and Agent—Party Informed That Settlement Agreement Requires Principal's Approval cannot Assume That Agency is General.

1. Where an automobile manufacturer's agent, in negotiating a settlement of the business affairs of such manufacturer and a local dealer, informed the dealer that any settlement would have to be taken up with the home office, the dealer was in no position to assume that his agency was general.

Judgment—Recovery must be Based on Allegations of Complaint.

2. In an action on a complaint seeking to enforce defendant corporation's liability to pay for the use of premises solely upon the agreement of its agent with plaintiff lessee, no liability of the company to pay for the premises merely because possession was turned over to it can be enforced.

Corporations—Liable for Agent's Conversion of Goods Used in Its Business.

3. Where an automobile manufacturer's agent in charge of its factory branch, in connection with which it operated a garage and repair-shop, converted articles left on the premises by a dealer formerly acting as its local agent, and the articles were such as one would naturally expect to find in a garage or repair-shop, and most of them could have been rightfully purchased by him under his admitted authority, it was liable for their value in an action on implied contract.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is an action to recover money. The complaint contains two causes of action. The Portland Motor Car Company was an Oregon corporation. The defendant is an Ohio corporation engaged in the manufacture of automobiles, with its principal office in Cleveland, Ohio; and, although its name was changed twice during the period covered by this controversy, it will at all times be referred to as the Winton Company, its present name.

The Portland Motor Car Company had a contract with the Winton Company under the terms of which the former was made the agent for the sale of the latter's automobiles in certain territory in Oregon and Washington. In January, 1912, the Oregon company leased a building in Portland for a period of five years for a monthly rental of \$300 during the first two years of that period. The Oregon company maintained in this building a garage and an automobile repair-shop in connection with its business of selling automobiles manufactured by the Winton Company. In the latter part of 1912 differences arose between the two corporations concerning the agency, and because of those differences they negotiated for a settlement of their business affairs. These negotiations resulted in a written contract terminating the agency of the Oregon corporation. The contract was signed by the Oregon company on or about January 15, 1913, although when signed by it the paper bore no date except the month and the year; the day of the month was left blank. After being signed by the Oregon company, the instrument was forwarded to Cleveland, Ohio, for the signatures of the officers of the Winton Company. The defendant signed the contract, but before doing so filled the blank for the day of the month and changed the word "January" to the word "February," thus dating the paper February 1, 1913.

There are two provisions in the contract which are material to this litigation. One relates to a transfer of the lease, and the other to the sale of certain tools and equipment owned by the Oregon company. The Oregon company had sublet a part of the building to Henry L. Mann, who was obligated to pay a rental of \$100 per month. Under the terms of the contract the Oregon company assigned to the Winton Company the

lease held by the former together with the lease to Mann. The writing also recites that the Oregon company sells to the Winton Company "the following described property"; and this recital is followed by an itemized list of over fifty articles of personal property amounting in the aggregate to the stipulated value of \$1,124.92. The Winton Company bought only a part of the tools and office equipment owned by the Oregon company. The items enumerated in the written contract include only those articles which the Winton Company purchased. The tools, office equipment, and other personal property which had been used by the Oregon company were not removed, but were left in the building. The Winton Company took possession of the leased building and of the personal property purchased from the Oregon company.

In the negotiations for the contract terminating the agency the defendant was represented by G. W. Miller. Plaintiff claims that when the contract was signed, Miller, as the representative of the Winton Company, agreed that the defendant would pay the rent, required to be paid under the terms of the lease, commencing with January 1, 1913. The defendant denies liability for the month of January, and contends that its liability begins with the date of the contract, February 1, 1913. The Winton Company did not pay the rent for January or February, and the Oregon company was obliged to pay the rent for those two months. The net expense to the Oregon company for the rent for those two months, after deducting \$200 paid by Mann, the sublessee, amounted to \$400.

The plaintiff also claims that after the Winton Company entered into possession of the leased building it converted to its own use a large part of the tools and other articles which the Oregon company owned and

had left in the building. The items of personal property alleged to have been appropriated by the Winton Company are claimed to have been worth, in the aggregate, the sum of \$557.04.

The Oregon company was dissolved, and both the claim for rent and the claim for the value of the personal property alleged to have been converted were assigned to L. J. Wentworth, one of the stockholders of the Oregon company; and he then brought this action. The first cause of action is to the effect that the Winton Company agreed to take over the lease and pay the rent from January 1, 1913; and the plaintiff therefore says that because of the failure of the defendant to pay the rent for the months of January and February it is indebted to him in the sum of \$400.

In the second cause of action there are averments of the alleged conversion of specified articles of personal property, followed by an averment that the plaintiff waives the tort and elects to sue the defendant on its implied obligation to pay the reasonable value of the property said to have been converted.

The defendant denies all the averments of the complaint except as otherwise affirmatively alleged in the answer. There is also a further and separate defense in which the defendant recites the execution of the contract terminating the agency and in which it is alleged that all the transactions between the two corporations were fully settled.

The reply denied that the contract settled all the transactions between the corporations and averred that the contract in no way affected the claim constituting the second cause of action. It was further alleged in the reply that the contract was actually made "in the fore part of January, 1913, and not on the first day of February, 1913."

The parties tried the cause to the court without the aid of a jury. The court signed and filed findings of fact from which he concluded that the plaintiff was entitled to recover \$200 on account of rent for February and that he was not entitled to recover any further sum on either cause of action. There was a judgment against the defendant for \$200 and the plaintiff appealed.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. W. Y. Masters*.

For respondent there was a brief over the name of *Messrs. Wilbur, Spencer, Beckett & Howell*, with an oral argument by *Mr. F. C. Howell*.

HARRIS, J.—The trial court ruled that the defendant was liable for the rent for the month of February, but that it was not liable for the rent for the month of January. The first cause of action, which relates to the rent, proceeds on the theory that it was agreed between the two corporations that in consideration of the termination of the agency the Winton Company would take over the lease and assume the payment of the rentals "from and after the first day of January, 1913." The written contract does not say that the defendant shall pay the rentals from and after January 1, 1913. This paper, it will be recalled, was signed by the Oregon company on or about January 15, 1913, and then delivered to G. W. Miller so that he could forward it to Cleveland, Ohio, for the signatures of the officers of the Winton Company. When the Oregon company signed the paper it was dated January, 1913, but there was an unfilled blank for the day of the month. When the officers of the Winton Company signed they filled

the blank and dated the instrument February 1, 1913. The plaintiff claims that Miller, acting for the defendant, and the Oregon company agreed when the latter signed the contract that the Winton Company would pay the rent from and after January 1st. If the defendant is liable at all for rent for the month of January, it is liable only because of the agreement which Miller attempted to make.

Miller was the manager of the "factory branch at Seattle, Washington." The Winton Company sent him to Portland to negotiate for a settlement of the differences which had arisen between the two corporations. On November 19, 1912, Miller wired to the Oregon company:

"Have taken up with factory matter of taking over your plant but have been turned down cold. * * "

On November 30, 1912, Miller wrote to the Oregon company a letter which opens thus:

"Confirming a talk I had with your Mr. Ettinger regarding what the writer, personally, would be willing to do, which talk or action must be verified by our home office at Cleveland.

"I would state that it would be satisfactory to assume the lease on the building you now occupy, known as the Winton Building, with the understanding that the rent of this building is \$300 per month with the privilege of subleasing any part of the rooms now occupied by other tenants."

After discussing certain details the letter concludes with the following paragraph:

"It is distinctly understood that this is not a proposition; it is only a line of suggestion for you either to accept or reject and for me to take up with the home office."

1, 2. Thus it is seen that, while the Oregon company was dealing with Miller as a known agent of the Winton

Company, nevertheless the Oregon company was in no position to assume that Miller's agency was general, because the Oregon company had information to the contrary: *Leavitt & Co. v. Dimmick*, 86 Or. 278, 288 (168 Pac. 293); *Hillyard v. Hewitt*, 61 Or. 58, 62 (120 Pac. 750); *Aerne v. Gostlow*, 60 Or. 113, 121 (118 Pac. 277). Miller had authority to negotiate for the Winton Company but he was without authority to bind it. The Oregon company was told by Miller in express words by the letter of November 30th, that he had no authority except to negotiate; and the fact that the written contract, after having been signed by the Oregon company, was delivered to Miller to be forwarded to Cleveland, Ohio, there to be signed by the officers of the defendant was of itself an indisputable acknowledgment of Miller's lack of authority to bind the Winton Company. It is possible that, independently of the agreement with Miller, the defendant is liable for the rent at least from January 16th, because of the alleged fact that the premises were turned over to and received by the defendant on that day; but, if there is such a liability, it cannot be enforced in this action on the present complaint for the reason that the plaintiff is here seeking to enforce liability solely upon the agreement of Miller. The findings and conclusions of the trial court concerning the rent must be approved.

3. The plaintiff contends that the findings of fact which relate to the second cause of action do not support the conclusions of law deduced by the court. Finding V, which is the first finding connected with the alleged conversion of the personal property, is to the effect that the portion of the property "that was not purchased by the Winton Company under the contract aforesaid was left in charge of the Portland branch of the Winton Company by direction of G. W.

Miller, manager of the Seattle branch, with the understanding that subsequently the said G. W. Miller would take up the question of the purchase of the balance of said property with said Portland Motor Car Company from the Seattle branch."

In finding VI, it is related that after the execution of the written contract terminating the agency "the Winton Company opened up a factory branch in the City of Portland, Oregon, in the premises described in the lease in said agreement mentioned, and advertised in the newspapers of the City of Portland that it had opened up a factory branch, with H. R. Roberts as manager thereof, and issued its stationery and bill heads describing said business as a factory branch of the Winton Company in Portland."

Finding VII, the remaining material finding, reads as follows:

"That subsequently said H. R. Roberts returned to the plaintiff a portion of the property that had been left with the Winton Company aforesaid, but kept and retained the property described in the complaint herein, and used and consumed the same in carrying on said business of the said branch of said Winton Company, and said Winton Company had the use and benefit thereof, but denied that said H. R. Roberts had any right or authority to take or convert said property or that it is liable therefor."

These findings may possibly be better understood if a brief account is given of additional portions of the record. The Oregon company maintained its sales department and garage and repair-shop in the leased building. The Oregon company had in its possession on consignment from the Winton Company certain "parts" which were kept in what one witness called the "parts-room." At some time in 1912, either in November or December, H. R. Roberts, representing

the Winton Company, took and retained possession of the "parts-room." The plaintiff claims that the personal property purchased by the Winton Company together with the building was turned over to the Winton Company on January 16th, the next day after the Oregon company signed the contract, while the defendant insists that it took possession of the premises on February 1st. At any rate, whether the possession was delivered by the Oregon company on January 16th or on February 1st, it is conceded that whenever possession was taken it was taken by H. R. Roberts as the agent of the defendant. The Winton Company continued the business of selling automobiles, and it also continued to maintain a garage and repair-shop. The billheads used by the defendant referred to its place of business in Portland as "Factory Branch." Some of the letter-heads referred to the place of business as "Portland Branch" of the defendant. Roberts signed letters as the "Portland Mgr." of the defendant; and it is not contended that he was without authority thus to sign letters. The tools and equipment purchased from the Oregon company by the Winton Company were purchased for use in the business which the defendant continued to maintain. Roberts hired the men employed in the garage and repair-shop. According to the testimony of A. J. Schaefer, who succeeded Miller as manager of the Seattle branch, Roberts did not have any authority "that he did not get from" the witness; and yet when asked whether Roberts had any authority "to buy such goods as are described in this complaint * * in a general way" the witness answered as follows:

"Oh, yes, in the ordinary conduct of his business he would buy such things as grinding compound, oils, gasoline, and tools for drill-presses, or anything of that sort, as they went out, and these bills were approved

by Cleveland, audited by Cleveland, and that is all. He wouldn't have any authority to buy anything in bulk, or machinery, or even typewriters, or anything of that sort that pertained to the plant and equipment."

The complaint enumerates more than one hundred and forty items, and they include such tools and appliances as are ordinarily used in a garage or repair-shop, a few trade fixtures, an assortment of materials used in repairing automobiles, a number of automobile parts, and seven or eight office appliances, such as letter-trays, inkstands, a bill stamp, and the like. All of these articles were such as one would naturally expect to find in a garage or repair-shop. Most of the items were such as Roberts, as manager, could have rightfully purchased from time to time for use in the garage or repair-shop, even though his authority be strictly measured by the limits fixed by Schaefer; and consequently on the finding that the defendant used and consumed all these items in carrying on its business and "had the use and benefit thereof" it is manifest that as to these items at least the plaintiff was entitled to a judgment. The items enumerated in the complaint vary in value from five cents, the price of certain cotter-pins, to \$50, the price of five outside casings. It is clear that nearly all of the articles enumerated in the complaint were within the needs of the principal's business and therefore within the scope of the actual or apparent authority of Roberts, who was the managing agent of the defendant's business during the period in which the articles were converted; and it may be that every one of the items was within the needs of the principal's business: 2 C. J. 643, 644.

It is difficult because of the condition of the record to do more than to hazard a guess at the value of the articles sued for; otherwise, we might attempt to fix

the values of all the articles and render a final judgment here, on the authority of Article VII, Section 3 of the Constitution.

The judgment is reversed and the cause is remanded for such further proceedings as may not be inconsistent with this opinion.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

Argued February 4, affirmed March 16, 1920.

MACK v. THATCHER.

(187 Pac. 1114.)

Appeal and Error—Party cannot Complain of Confirmation of Defendant's Title to Property Which He Did not Claim.

1. Where in a suit to cancel deeds to separate pieces of property plaintiff testified that he did not claim one of the pieces of property, did not want it, and was willing that it should be decreed to defendant, he cannot on appeal attack the decree confirming defendant's title thereto.

Deeds—Evidence Held to Show Undue Influence by Real or Imagined Fears of the Plaintiff's Wife.

2. Where plaintiff, 87 years old and blind and deaf, joined his wife in conveying to defendant, her nephew, who was living with them, property purchased with plaintiff's money, being induced by her fears, caused either by defendant's threats or by her hallucination that defendant would leave them helpless, plaintiff's conveyance was not the act of his will and will be set aside.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 1.

This is an equitable proceeding, wherein plaintiff seeks the cancellation of certain conveyances of real property. The substance of the complaint is that on July 13, 1910, plaintiff married Sarah Cleveland Mack, the plaintiff then being 80 years of age and the bride

about 65. Prior to the marriage both of them were leading comparatively lonely lives, the plaintiff's children being grown, and having homes of their own, while the wife's only relative was the defendant herein, who was her nephew, then about 30 years of age, and who had lived with his aunt, plaintiff's wife, for several years. At the time of the marriage the wife was the owner of three lots in the City of White Salmon, Washington, bringing in revenue to the extent of about \$10 per month, and shortly after the marriage the plaintiff entered into a contract for the purchase of a small property in that portion of the City of Portland known as St. Johns, which was used as a home by plaintiff and his wife, and which was paid for in small monthly installments by the plaintiff from moneys received by him as a pensioner, he having been a veteran of the Mexican War. When the final payment was made, it is alleged that the defendant, by reason of his aunt's unbounded affection for, and confidence in him, was successful in persuading plaintiff to have the conveyance taken in his wife's name, by representing that she, by reason of the fact that she was fifteen years younger than plaintiff, would doubtless outlive him, and that, if the home were in her name, she would be relieved of the trouble and expense of probate proceedings, and that if plaintiff did not so act, the defendant would leave them uncared for in their old age, and would not assist them. The deed to plaintiff's wife was executed on December 29, 1916.

During the summer of 1917, the wife became very ill, suffered extreme physical pain and mental anguish, to such an extent as to render her mentally unbalanced, so that she acquired a very melancholy attitude toward life, was filled with gloomy forebodings of disaster, imagining that her nephew was going to leave her in

her illness, and her mind became so affected that she was incapable of comprehending the nature and effect of any act she might perform, and defendant, being aware of her condition, and of the further fact that plaintiff, by reason of his extreme age, was practically helpless, intimidated his aunt by his threats of leaving them helpless, and, through her, and her consequent importunities, coerced the plaintiff to such an extent that the two were prevailed upon to execute conveyances to defendant of all their real property, which conveyances were executed on October 27, 1917, and no consideration was paid by him therefor. The wife died on November 1, 1917, three days after the execution of the aforesaid conveyances.

The answer admits the marriage, the ages of the parties, the relationship of defendant to the deceased wife of plaintiff, the purchase of the St. Johns property, and the payment therefor from moneys derived from plaintiff's pension, and the ownership by the wife, of the property in White Salmon. All other allegations are denied.

A trial was had resulting in a decree awarding a cancellation of the conveyance of the St. Johns property, but confirming the title to the White Salmon property in defendant. From this decree both parties appeal.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. A. Hansen* and *Mr. Henry S. Westbrook*.

For respondent there was a brief over the names of *Mr. Arthur I. Moulton* and *Mr. William P. Lord*, with an oral argument by *Mr. Moulton*.

BENSON, J.—1, 2. There are no new or unsettled legal questions presented by this appeal. Plaintiff's cross-appeal is based upon the action of the trial court in confirming defendant's title to the property in White Salmon. As to this it is sufficient to say that plaintiff repeatedly asserted, while upon the witness-stand, that he was not claiming the White Salmon property, did not want it, and was perfectly willing that it should be decreed to be the property of defendant. Regarding the St. Johns property, the defendant insists that the decree entered by the trial court is not justified by the evidence. This contention is resisted with equal vigor by the plaintiff.

After a very careful investigation of the record, we find the facts to be substantially as follows: At the time of the wedding in 1910, the plaintiff, who was a pensioned veteran of the Mexican War, was about 80 years of age, a widower, whose children had all reached the age of maturity, having homes of their own; the woman who then became the wife of the plaintiff was a widow, who had experienced two prior marriages. Her first husband died, and she had obtained a divorce from the second. At the time of this third marriage she was about 65 years of age, and was then conducting a rooming-house in Portland, assisted by her nephew, the defendant.

Shortly after the marriage they decided to acquire a home of their own, and purchased the assignment of a contract to buy a house and lot in St. Johns, which is now a part of Portland. A new contract was issued by the owner of the legal title, and therein plaintiff and his wife were named as the purchasers. It was suggested by the vendor that, since both of them were well advanced in years, it would be well for each of them to assign his or her interest in the



contract, so that the survivor of them might complete the payments and secure the legal title without expensive legal proceedings, and the plaintiff did execute such an assignment to his wife. The wife, however, was subsequently reluctant to make such an assignment, and the plaintiff, assuming that, if he happened to outlive her, he would be her sole heir in any event, did not press the matter. The defendant continued to live with the aged couple for the greater portion of the time until the death of his aunt. The monthly payments upon the property were all made by the plaintiff from his pension money, and from the proceeds of a piece of real property in eastern Oregon, belonging to plaintiff, and on December 29, 1916, full payment having been made a deed was issued to the wife.

During the summer of 1917, the wife became seriously ill and gradually such illness increased in severity until on November 1st of that year she died. She had at all times displayed a very strong affection for the defendant, and after her illness became serious she assigned to him her bank deposits, amounting to about \$500. The fact that she had this money had never been disclosed to the plaintiff. On September 23, 1917, at her solicitation, the defendant acted as scrivener in the making of a will for his aunt, wherein she devised everything she had to him, including the home. Thereafter she became dissatisfied with that manner of disposing of her property, and a notary public was called in who prepared conveyances of both the St. Johns property and the White Salmon property. During the last two years prior to the death of Mrs. Mack the plaintiff's eyesight had been rapidly failing, and for some time he had been practically blind, and was also very deaf, so that for the last three months of Mrs. Mack's life, both she and her

husband were almost helpless and dependent upon the nephew for their care. Speaking of the execution of the deeds, and existing conditions at that time, the plaintiff testifies as follows:

“And when she got sick she got deranged, and it was a strange derangement; she imagined that everything bad was coming to her and nothing good. On the very day that those deeds were signed in the evening just before dark, Charles had some things out on the line, and it looked like rain, and he went out to put them in a storeroom that we had, and it was just adjoining the toilet and before that she had told me that Charles Thatcher was going to put her down in the cesspool; she was afraid he was going to put her down in the cesspool, and I told her he couldn't do it, the hole was not big enough, and she said: ‘He could tear up the seat.’ And the last night before that she came in and she says: ‘Charles has the hatchet and he is going to take up the seat and put me down in the cesspool.’ And then she came and sat by me and she says: ‘Charley is going to leave, and he is going to take you with him, and he is going to have the light and water and gas shut off, and he is going to leave me without nothing but the stove and woodpile.’ And she says: ‘I am going to lose my sight, and my hair, and then I am going to lose my hearing and the use of my hands and feet, so that I cannot wait on myself, and I will be just as helpless as a baby, and no woman will take care of me in such a condition as that without good pay, and I haven't got a cent to pay a woman with, Charley has got everything.’ And before we signed those deeds, when he went to Wolcott's, or when he went to phone for Wolcott, while he was gone, she says to me: ‘I don't want to sign those deeds, I don't want to sign them.’ She didn't want to part with her property until she was dead, she wanted to keep it as long as she lived, and I had that property deeded to her for that very purpose, that when I died she would have a home. * * I know of nothing that transpired between them

except from what she told me, but she told me plainly that she did this under coercion, this signing of the deeds, that he threatened to put on his hat and leave us in our helplessness unless we did deed him everything that we had, and she said that he would not stay and care for us unless he had his pay, and the will that she was going to make, he was explaining all that day that it might be contested and that it would not take effect until after I died, and he insisted on deeds, and if she had been sound and well I would have refused, but so long as she was suffering so badly I couldn't refuse her anything, and she was suffering so intensely worse than anything I ever saw in my life, and it distressed me, for I loved the woman; she was a good, kind woman. It was forced, and it might just as well have been a revolver placed to our breasts and told us to sign those deeds. She didn't want to do it, and she told me, she says: 'I don't want to sign those deeds,' but she thought she had to—anything rather than have him go away and leave us in our helplessness. I was blind and she was sick unto death."

The defendant testifies that he never asked his aunt to give him any of her property, and that so far as he was concerned, her action was purely voluntary, and that the consideration for the conveyances was love and affection. If we accept as true the statements which the wife made to her husband as to the reasons which actuated her in executing the conveyance, then there can be no controversy but that she was the victim of undue influence. But, upon the other hand, if we adopt as true the testimony of the defendant, and that he did not threaten to desert them in their hour of need, then it equally follows that as to her the deed is invalid for the reason that she was suffering from a hallucination which controlled her action and the deed was not her voluntary act.

Regarding the execution of the instrument by the plaintiff the evidence is clear that it was not an act of free and competent will power. The pressure brought to bear upon him by the terrified pleadings of his dying wife was sufficient to dominate his will and overwhelm his judgment. The defendant had at a prior date received from his aunt a transfer of her bank account, amounting to about \$500, the possession of which, by either of them, had been carefully concealed from the husband, who was then 87 years old, blind and deaf. Prior to the time of the execution of the deeds, the defendant had procured a blank form of a will, and had filled it out with a careful description of all the property of the old couple, which was presented to the old lady for signature, and was duly and properly executed by her. The deeds, which were executed on the fourth day before her death, were apparently for the purpose of making assurance doubly sure, that the old man should be stripped of everything but his pension. We think the evidence sufficiently establishes the finding of the trial court that undue influence was exerted upon the plaintiff to secure his execution of the conveyance, and that it was not his voluntary act. The decree of the lower court is affirmed, neither party to recover costs in this court.

AFFIRMED.

McBRIDE, C. J., and HARRIS and BURNETT, JJ., concur.

Argued February 18, affirmed March 23, 1920.

RICE v. RICE.*

(188 Pac. 181.)

Wills—Contestant has Burden of Showing Fraud and Undue Influence.

1. Contestants have burden of showing by a preponderance of the evidence their allegations of fraud and undue influence, which induced testatrix to make the will as she did.

Wills—Proponents must Prove Testamentary Capacity When Challenged.

2. When a will is challenged on the ground of want of testamentary capacity in testator, it is incumbent upon proponents to prove decedent's capacity to make a will by a preponderance of the evidence.

Wills—Evidence of Undue Influence Held Insufficient.

3. Testimony which simply showed that defendants had the opportunity to exercise undue influence upon testatrix was insufficient to authorize overturning of will.

From Wasco: WILLIAM L. BRADSHAW, Judge.

Department 1.

This is a proceeding instituted in the County Court of Wasco County to contest the will of Eliza J. Rice. Two of the plaintiffs are George W. Rice, son, and Emma Southern, a daughter of the decedent. The other plaintiffs, six in number, are grandchildren of the decedent, descendants of her deceased children. The two defendants, Austin C. Rice and Etta Waterman, are respectively son and daughter of the testatrix. She was 84 years of age. Her husband had died on January 10th; the disputed will was executed February 23d; and she died May 24th—all in the year 1915. Her estate was appraised at \$4,482.73. Two of the plaintiff grandchildren are children of Nellie Mann, daughter of the testatrix, who died subse-

*On burden of proof of testamentary capacity and undue influence in respect to wills, see note in 36 L. R. A. 737.

On presumption of undue influence from unnatural testamentary disposition, see notes in 6 L. R. A. (N. S.) 202; 22 L. R. A. (N. S.) 1024.

quent to the execution of the will and prior to the death of Mrs. Rice. After directing the payment of her debts and expenses of administration, the will made a bequest of \$1,500 to her son Austin C. Rice, and gave a legacy of \$10 to each of her other descendants then living except to her daughter, the defendant Etta Waterman. As a residuary clause, the document provided that all the remainder of the estate should be divided equally between the defendants Austin C. Rice and Etta Waterman.

The complaint by which it is sought to overturn the will is based solely on the ground of undue influence alleged to have been exercised upon the testatrix by the defendants, which the plaintiffs contend was sufficient to and did overcome the judgment of the testatrix, so that the will was not in fact her disposition of her property, but rather the product of the dominant wills and influence of the defendants. It is not averred that she lacked testamentary capacity.

On proper issues framed, the County Court heard the testimony and found in favor of the defendants. This judgment was affirmed on appeal by the plaintiffs to the Circuit Court, and they have prosecuted a further appeal to this court. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Mr. W. H. Wilson*.

For respondents there was a brief over the names of *Mr. R. R. Butler* and *Mr. Fred W. Wilson*, with an oral argument by *Mr. Butler*.

BURNETT, J,—1, 2. As taught in *Simpson v. Durbin*, 68 Or. 518 (136 Pac. 347), and *Sturtevant v. Sturtevant*, 92 Or. 269 (178 Pac. 192), the burden of proof is upon the contestants in such a case as this to prove by a preponderance of the evidence their allegations

of fraud and undue influence which induced the testatrix to make the will as she did. On the other hand, it is the rule that when a will is challenged on the ground of want of testamentary capacity in the testator, it is incumbent upon the proponents to prove the decedent's capacity to make a will, by a preponderance of the evidence. As stated, this latter issue is not present in the instant case. Here, the heat of contest seems to center about the legacy of \$1,500 left to the defendant Austin C. Rice. His father, husband of the testatrix, died without having made a will. The defendants explain that bequest in this wise: Austin C. Rice some years before his father's death was the owner of a tract of land in Wasco County, and, being in need of money, conveyed it to his father for the sum of \$1,000, although it was worth at the time, as witnesses say, \$2,500. While it was recognized that no legal obligation rested upon the father to make good the difference, it was conceded by both of the parents, as disinterested witnesses state, to be a moral obligation that the father should reimburse the son for the difference between the consideration named in the deed and the actual value of the land. Like many such family affairs, it was left open by the death of the father. The mother, speaking to disinterested witnesses, declared her intention to make good what her deceased husband had omitted, which seems to have convinced the County Court and the Circuit Court of the justice of the \$1,500 legacy to Austin C. Rice.

After the death of her husband, some of the plaintiffs proposed to place the testatrix under guardianship, and this proposal was favored by most of the contestants and acquiesced in by others of them, but was opposed by the two defendants here so strongly that finally it was abandoned. It had the effect, how-

ever, of offending the testatrix, and probably accounts for the nominal bequests to the contestants and the residuary clause in favor of the two defendants.

The authorities relied upon by the plaintiffs on the question of undue influence in the main rest upon false representations prejudicing the parent against some child who would be the natural object of her bounty. For instance, in *In re Budlong's Will*, 126 N. Y. 423 (27 N. E. 945), a son had married a domestic employed in his father's family which displeased the father very strongly. The parent seemingly acquiesced in the marriage afterwards, but it proved unhappy to the contracting parties. It seems that the husband on one occasion had grown very angry with his wife and uttered very harsh language to her in the presence of his sister, who rebuked him for his mistreatment of his wife. Later he went from New York to Iowa for the purpose of procuring a divorce from his wife. She, however, followed him and resisted the suit, pending which he wrote to another sister a bitter letter denunciatory of the sister in whose presence the quarrel with his wife had taken place, and falsely accused the sister of aiding the wife in the defense of his suit. He requested that this letter be shown to his father, which was done, and it aroused in the latter all his former antipathy against the son's wife and deeply incensed him against the sister. This was a circumstance submitted to the jury on the subject of undue influence. It was by no means the controlling feature of the case. It is not decisive of the present controversy. Here, no false representation is shown to have been made by the defendants respecting the conduct of the plaintiffs. The latter concede that the subject of guardianship was favored by them and opposed by the defendants, and this is what came to the old lady's knowledge.

3. There is no direct testimony that either of the defendants sought to influence the mother in the making of her will. They both flatly deny that they undertook to control her mind in any way respecting the disposition of her property. All that is shown is that they had opportunity to accomplish this sinister purpose, but that they availed themselves of the opportunity does not appear. It would be a profitless waste of space in the reports, without corresponding advantage to the profession or to the public at large, to go into details of the testimony in this opinion. That it is not enough to show mere opportunity to exercise undue influence is taught in *Rowe v. Freeman*, 89 Or. 428 (172 Pac. 508, 174 Pac. 727), and *Sturtevant v. Sturtevant*, 92 Or. 269 (178 Pac. 192).

A careful study of the testimony appearing in the record impels us to approve the conclusion of the County and Circuit Courts. The decree is affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued February 26, affirmed March 23, 1920.

HURST v. HURST.*

(188 Pac. 182.)

Mortgages—Burden is on Plaintiff Suing to have It Adjudged That Deed was Mortgage and had Been Paid.

1. In a suit to have it decreed that a deed constitutes a mortgage and has been paid, and that plaintiff is the owner and entitled to the possession of the property, the burden is on him to establish the affirmative allegations of his complaint, especially the allegation of payment.

*For authorities discussing the question of burden of proof with respect to character of the transaction, see subdivision XIII, Section 106, of comprehensive note in *L. R. A.* 1916B, 185.

On position of new partner as to partnership real estate, see note in 28 *L. R. A.* 104.

REPORTER.

Mortgages—Mortgagee Who had Never Been Repaid and had Purchased from Assignee for Creditors will be Treated in Equity as Owner.

2. Where members of a partnership executed a deed as security for the payment of money borrowed, taking a bond for title, and a new firm, their successors in interest, made an assignment for the benefit of creditors, and the holder of the security deed purchased the property from the assignee and was never paid the amount borrowed from her, she will be considered in equity as the owner.

Partnership—New Member of Firm Held to Acquire Interest in Land Treated as Partnership Property.

3. Where real estate was purchased by members of a partnership and used for partnership purposes only, and was considered as partnership property, and when one of them was succeeded by a new member of the firm both the old parties represented to him that the property was partnership property, and it was dealt with in such transaction as such property, the intention of the parties will govern, and the new partner acquired a one-half interest in the land.

From Douglas: JAMES W. HAMILTON, Judge.

Department 2.

This suit involves the title to lots 3 and 6 in block 6, in the town of Myrtle Creek, in Douglas County. The plaintiff filed suit, praying that a certain deed executed by plaintiff and his wife and one C. J. Rea to Margaret A. Hurst be declared to be a mortgage on said property, and that it be further decreed that the mortgage has been fully paid and that plaintiff be decreed to be the owner and entitled to the possession of the property. The trial court passed a decree in favor of defendants, from which plaintiff appeals.

On September 27, 1910, W. V. Hurst and C. J. Rea, partners under the firm name of W. V. Hurst and Company, engaged in the hardware and plumbing business at Myrtle Creek, Oregon, purchased from D. A. Morrison lots 3 and 6, block 6, in the town of Myrtle Creek, Oregon, for \$1,680, and used the same in their partnership business in connection with lot 4 of block 6, in the same town, together with the buildings thereon which they owned at the time. The property so pur-

chased was encumbered at the time by two mortgages, one in favor of Jennie Bogardus for the sum of \$500, and one in favor of Margaret A. Craig, who was the same person as Mary A. Hurst, for the sum of \$400, both of which were past due. It appears that at the time of the purchase the sum of \$680 was paid on the purchase price, and that in order to pay the balance of the purchase price which was represented by the amounts due on the two mortgages, Wm. V. Hurst and C. J. Rea borrowed the sum of \$900 from Margaret A. Hurst, the mother of Wm. V. Hurst, and in order to secure the payment of the same made and executed a deed to said lots 3 and 6, block 6, to Margaret A. Hurst, and she in turn executed a bond for a deed to the premises in favor of Wm. V. Hurst and C. J. Rea, conditioned that upon the payment of the sum of \$900, so loaned, together with interest at the rate of 8 per cent per annum on or before February 28, 1915, that she would reconvey the property to Wm. V. Hurst and C. J. Rea.

On March 11, 1912, Rea retired from the firm and his place was taken by one Van Buskirk, and the firm afterwards was known as Hurst and Van Buskirk, which succeeded to the ownership and possession of all the property and assets of the firm of Hurst and Rea, including the real property in question, it being understood at all times that the real estate was subject to the claim of Mrs. Hurst for \$900 and that she held the title as security. The affairs of Hurst and Van Buskirk becoming involved, Van Buskirk on October 9, 1913, made an assignment of the hardware business, together with the real estate owned by the firm where said business was carried on, and also lots 3 and 6, block 6, to one Lasswell, and as assignee Lasswell sold to Margaret A. Hurst lots 3 and 6, block 6, of the town of Myrtle Creek.

Before the institution of this suit C. J. Rea quit-claimed to W. V. Hurst all his interest in lots 3 and 6, in block 6. W. V. Hurst claims that on October 14, 1913, long before the same was due he paid to Margaret A. Hurst the full sum of \$900, together with accrued interest on the amount borrowed by W. V. Hurst and C. J. Rea; and also now claims that Margaret A. Hurst had no interest whatsoever in the lots and that no interest therein passed to her by virtue of the sale under the assignment proceedings.

Mrs. Margaret A. Hurst became the purchaser of the property in February 1914, paying the sum of \$300 in addition to her lien of \$900 and interest thereon. She died November 22, 1916, leaving a will by which she devised the property in question to David E. Hurst in trust for the use and benefit of Wm. V. Hurst during his lifetime, and upon the death of Wm. V. Hurst the property to vest in fee simple in the surviving children of David E. Hurst, who are named as defendants.

It is admitted by defendants that the deed made to Mrs. Hurst was intended as a mortgage. Defendants claim that whatever equity the firm of Hurst and Rea had in the property passed to the firm of Hurst and Van Buskirk and from them to the assignee; and that Mrs. Hurst by her purchase at the assignee's sale became the sole owner in fee simple of the property. Defendants deny that plaintiff ever paid to his mother any part of the loan of \$900.

In addition to the fact that the assignee's deed passed title to Mrs. Hurst, defendants pleaded that the plaintiff is estopped to claim any interest in the land except what the will of his mother gives him, for the reason that during a period of more than two and one-half years he never made any claim that he owned

any interest in the property, either to his mother or to anyone else, until after her death, and that he stood by and saw his mother invest about \$800 in improvements on the property. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. J. G. Watson* and *Mr. Ira B. Riddle*, with an oral argument by *Mr. Watson*.

For respondents there was a brief and an oral argument by *Mr. B. L. Eddy*.

BEAN, J.—The gist of plaintiff's complaint is that the lots in question were deeded to Mrs. Margaret A. Hurst to secure the payment of \$900, and that he paid the debt and Rea, the other owner, quitclaimed to him. Therefore he is the owner of the property.

1. The burden of proof is on the plaintiff to establish the affirmative allegations of his complaint, and especially the alleged payment of the \$900 to his mother, Margaret A. Hurst. After a careful reading of all the testimony in the case we think the plaintiff has failed to sustain the main allegation of his complaint.

2. The lots having been conveyed to Margaret A. Hurst by Wm. V. Hurst and C. J. Rea, the owners in fee thereof, and Mrs. Hurst having acquired all the equitable interest of the firm of Hurst and Van Buskirk, who were successors in interest to Wm. V. Hurst and C. J. Rea, partners under the firm name of W. V. Hurst and Company, and paid therefor the sum of \$300 to the assignee for the benefit of the creditors of the later firm, and the \$900 never having been paid, in equity Margaret A. Hurst should be considered to have been the owner of the lots.

3. There is an interesting discussion in the briefs as to partnership property which is often of great importance, but we fail to see that it becomes very material in this case, as no creditors of the partnership are making any claim to the property and no member of the two firms mentioned except plaintiff is asserting any right thereto. However, the testimony clearly shows that the property in question was purchased by Wm. V. Hurst and C. J. Rea, partners as W. V. Hurst and Company, and used for partnership purposes only, and when Van Buskirk, the partner who succeeded Rea, came into the firm both Hurst and Rea represented the property to be partnership property, and the documentary evidence shows that at the time of that transaction it was dealt with as partnership property by the parties interested. The evidence also shows that the property was at all times used for partnership purposes and considered as partnership property.

When real estate is paid for with partnership funds and used for partnership purposes, and the circumstances all show that the partners understood that the land should be partnership property, the intention of the parties as shown by the agreements and by their conduct will govern. Hence when Van Buskirk came into the firm he took a one-half interest in the land: *Jarvis v. Brooks*, 27 N. H. 37 (59 Am. Dec. 359); *Divine v. Mitchum*, 4 B. Mon. (Ky.) 488 (41 Am. Dec. 241); *Goldthwaite v. Janney*, 102 Ala. 431 (15 South. 560, 48 Am. St. Rep. 56, and note at p. 64, 28 L. R. A. 161); *Blakeslee v. Blakeslee*, 265 Ill. 48 (106 N. E. 470); *Darrow v. Calkins*, 154 N. Y. 503 (49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299).

In regard to the status of firm real estate in equity, it is stated in 20 R. C. L., page 853:

"Although under the rules of the common law, as already seen, a partnership as such cannot hold the legal title to land its ownership will be completely recognized in equity, regardless of the state of the legal title, it being of no importance who holds the legal title, or how he came by it, excepting so far as these facts express or reveal the intention of the partnership."

The decree of the lower court was right and is affirmed.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BENNETT, JJ., concur.

Argued February 18, reversed and remanded March 23, 1920.

KENDALL v. TRAVELERS' PROTECTIVE ASSN.

(188 Pac. 188.)

Appeal and Error—Rulings on Former Appeal were Law of Case and Binding on Parties and Court.

1. A ruling, on a former appeal from an order granting a new trial, that an instruction should have been given, became the law of the case, binding alike upon the parties and the court.

Trial—Requested Instruction as to Right to Recover Accident Insurance not Covered by One Given.

2. In an action against a fraternal insurer for accident benefits, a requested instruction that if plaintiff directed a barber to remove an ingrowing hair, and he proceeded to remove it under plaintiff's instructions, plaintiff could not recover, though the work was unskillfully done, and the results not such as were anticipated, *held* not covered by an instruction given, which permitted the jury to find the element of accident in the barber's unskillfulness.

Appeal and Error—Evidence not Sufficiently Different to Justify Refusal of Instruction Approved on Former Appeal.

3. In an action against a fraternal insurer for accident benefits, evidence *held* not sufficiently different from that on a former trial to justify refusal of an instruction approved on the former appeal.

Appeal and Error—Direction of Verdict Improper Where Court Ruled on Former Appeal That There was Question of Fact.

4. In an action against a fraternal insurer for accident benefits, on account of disability resulting from blood poisoning claimed to

have been due to a wound inflicted by a barber while removing an ingrowing hair, a directed verdict was properly denied where the court ruled, on a former appeal from an order granting a new trial, that it was a question of fact whether the means producing the injury were accidental or not.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1.

The defendant, Travelers' Protective Association of America, is a fraternal insurance corporation. The plaintiff, T. W. Kendall, was a member of the association, and entitled to all the benefits set forth in its constitution and by-laws. The association pays to a member \$25 per week for a total disability and \$12.50 per week for a partial disability. On November 13, 1914, a barber removed either one or two ingrowing hairs from the plaintiff's chin, and blood poisoning ensued, with the result that the plaintiff was wholly disabled for about thirty-two weeks and was partially disabled for about a week.

There were only two witnesses at the trial. The plaintiff testified in his own behalf, and the barber appeared as a witness for the defendant. These two witnesses did not give the same account of what occurred in the barber-shop. According to the version given by the plaintiff, he went to the barber-shop "for the purpose of getting a haircut and a shave." After the barber had shaved the plaintiff and cut his hair, but before the plaintiff left the chair, the barber stated, according to the testimony of the plaintiff, that "there was an ingrowing hair which should be taken out," whereupon the plaintiff said, "take it out." The plaintiff says that the hair was "at the edge of the chin," on "the left side of the chin, on the left point." The chair occupied by the plaintiff was "next to the door as we went in." After the plaintiff had told the barber to

remove the ingrowing hair, a towel supply man entered the shop, and thereupon while the towel man was "leaning up against" a post "to this side (the left) of me," and the barber was standing at the right side of the plaintiff, the towel man and the barber became involved in an altercation about a "shortage of towels, or an overcharge, or something of the kind." While in the act of attempting to remove the hair, and because of the altercation with the towel man, the "barber looked up," and he applied the tweezers "at a different place from where the hair was ingrowing," and removed a piece of the skin, causing a "wound." The following excerpt taken from the recorded testimony of the plaintiff is a concise statement of his recollection of what happened after he told the barber to remove the ingrowing hair:

"At the time, or just about the time, that" the barber "was taking the hair out, or just a moment before, he got into an altercation with a towel supply man, who came in, and I don't now remember whether it was when he came in, or when it was going out; anyway he was right by his chair, and as he attempted to get this hair out he looked up, having the fuss with the towel man, and made an endeavor to get the hair, and in doing so he removed quite a piece of the skin—made a wound that was very noticeable."

The barber "afterwards secured the hair." In the language of the plaintiff, there were two "operations" or attempts to secure the hair; one resulted in the "wound," but in the other the barber succeeded in removing the hair. The "wound" bled, and the barber "cauterized it with a caustic stick which they all have to stop the flow of blood." There was "a little inflammation" the next morning, "a decided inflammation in a very few days," and finally a case of pronounced blood poisoning. The plaintiff stated that

"the infection started in here from the wound." When asked, "Did the point where the hair was removed become infected?" This witness answered, "No, I think not; the infection started from this wound."

The barber testified that when the plaintiff sat down in the chair he said that he thought "there are some hairs bothering me," and he, the barber, thereupon looked and "saw a little red spot" in the middle of and "just under the point of the chin." According to the story told by the barber, the plaintiff then said that the "little red spot" had "been bothering him for eight or ten days," and "if you can see any hair there I would like to have you take them out." The barber heated his tweezers over an alcohol lamp, cooled the instrument in running cold water, bathed it in a solution of bichloride of mercury, "stuck it into a bottle of peroxide," and then removed the two hairs from the red spot. When asked whether he and the towel man became involved in an altercation, the barber answered, "Not that I know of." The witness stated that he did not "remember breaking the skin, or anything at all, because all I had to do was to lift the two hairs out of the top of it." The barber further testified that he did not "make any wound of any kind on him at all at no time." To the question, "Mr. Kendall has testified here that the ingrowing hairs were at one point on his face, and that you made a wound at another point on his face; is that true?" The witness gave the categorical answer, "No."

The constitution of the association contains the following provision for the payment of indemnity:

"Whenever a member of this association in good standing shall, through external, violent, and accidental means receive bodily injuries which shall in-

dependently of all other causes immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation."

Another provision found in the same constitution reads as follows:

"This association shall not be liable in case of injury, fatal or otherwise, inflicted by a member in good standing on himself, or in case of * * death or disability when caused wholly or in part by any bodily or mental infirmity or disease or by intentional injuries causing death or disability inflicted by the member, or any other person, upon him, * * or injury, fatal or otherwise, resulting from any poison or infection (unless the infection is introduced into, by, or through an open wound, which open wound must be caused by external, violent, and accidental means and be visible to the naked eye) * * or disability resulting from medical or surgical treatment, * * nor shall the association be liable in any case where the injury or death is not caused by external, violent, and accidental means independently of all other causes and is not the sole or proximate cause of the death or disability."

There was a verdict and a judgment for the plaintiff for \$810.70; the full amount demanded by him. The defendant appealed.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. McCamant, Bronaugh & Thompson*, with an oral argument by *Mr. Wallace McCamant*.

For respondent there was a brief over the name of *Messrs. Davis & Farrell*, with an oral argument by *Mr. W. E. Farrell*.

HARRIS, J.—There have been two trials, with a judgment for the plaintiff in each instance. The

first verdict and judgment were set aside by the circuit judge and a new trial granted, and upon an appeal the order granting the new trial was affirmed: *Kendall v. Travelers' Protective Assn.*, 87 Or. 179 (169 Pac. 751). The case is now here on appeal from the second judgment. There are two assignments of error. The court refused to give the following instruction requested by the defendant:

"The jury is instructed that if plaintiff directed the barber to remove the ingrowing hair from his chin, and the barber proceeded to remove the hair under instructions from plaintiff, plaintiff cannot recover in this case, even though the work of the barber was unskillfully done, and the results were such as neither plaintiff nor the barber anticipated."

The trial court also refused to comply with the defendant's request to direct the jury to find for the defendant.

1, 2. At the first trial the defendant requested, but the court refused to give, the quoted instruction. On the first appeal we ruled that the instruction should have been given, and that ruling became the law of the case, binding alike upon the parties and the court: *Applegate v. Dowell*, 17 Or. 299 (20 Pac. 429); *Taylor v. Taylor*, 54 Or. 560, 567 (103 Pac. 524). Not even the substance of the requested instruction was given, unless it can be found in the following portion of the charge to the jury:

"The burden of proof in this case devolved upon the plaintiff. He must prove by a preponderance of evidence that he sustained such an accidental injury as is insured against in the constitution and by-laws of the defendant. In the absence of such proof plaintiff cannot recover. The defendant insured plaintiff only against bodily injuries received through external, violent, and accidental means. In order that plaintiff

may recover, he must satisfy you that his injuries were due to an accidental cause, and also that they were due to a violent cause. If the evidence fails to satisfy you on either of those points, your verdict will be for the defendant. If the abrasion of the plaintiff's chin was due to the intentional act of the barber in endeavoring to remove an ingrowing hair thereon, plaintiff cannot recover, and your verdict will be for the defendant. If, in removing the ingrowing hair from plaintiff's chin, the barber acted carefully, making no more incisions than he intended to make, and thereafter the wound became infected, causing the disability of which the plaintiff complains, then I instruct you that plaintiff cannot recover, and your verdict should be for the defendant. Plaintiff was insured by the defendant only against disability arising independently of all other causes, from bodily injuries received through external, violent, and accidental means. If, therefore, you find that plaintiff's disability was caused in part by something other than bodily injuries received through external violent and accidental means, you should find for the defendant."

We are unable to agree with the plaintiff in his contention that the charge given by the court contains the substance of the requested instruction. The refusal to give the instruction, as requested by the defendant, permitted the jury to find the element of accident in the unskillfulness of the barber, if there was any. Moreover, the requested instruction is in complete harmony with the announcement made by the opinion delivered on the first appeal that "the liability must be determined by causes rather than consequences." Because of the refusal of the court to give the requested instruction, we are obliged to reverse the judgment, notwithstanding the fact that there have been two trials.

3. The record made at the second trial is in some particulars different from that of the first trial. The

plaintiff did not, at the first trial, testify that there were two "operations," or "two attempts to get out this ingrowing hair"; nor did he at that trial "say anything to the effect that the wound was at a different place from where the hair was ingrowing." These differences, however, are immaterial, so far as the law of the case is concerned. Aside from the two particulars mentioned, the testimony of the plaintiff was substantially the same in both trials. It was the theory of the plaintiff at both trials that the barber and the towel man became engaged in an altercation, as a result of which the plaintiff sustained the "wound" from which blood poisoning developed. It was the contention of the defendant at both trials that there was no evidence to show that the blood poisoning was caused by accidental means. This contention of the defendant naturally presents itself in two phases; one arising out of the defendant's, and the other out of the plaintiff's theory of the facts. The plaintiff concedes, if we correctly understand his position, that, if the story told by the barber is accepted as a correct account of what occurred, then the disability cannot be said to have been caused by accidental means. According to the barber, he did nothing except what he intended to do, and he was nowise disturbed or interfered with when doing what he intended to do, for he does not admit that he was involved in any altercation with the towel man. The law of the case as made on the first appeal is that the plaintiff cannot recover if the barber's narrative is believed. It is true that the barber was not produced as a witness at the first trial; but it is also true that, when he was produced as a witness at the second trial, he testified in substance that in removing the hairs he did nothing more than he intended to do.

4. It was not decided on the first appeal that there was no evidence to sustain a judgment; but, on the contrary, it was expressly ruled that it was a question "of fact for the jury to determine whether the means producing the injury was accidental or not." This ruling was made because of the testimony of the plaintiff concerning the altercation with the towel man; and when the court made that ruling it was equivalent to deciding that, if the story told by the plaintiff is accepted as a correct account of what happened, it is sufficient to support a finding that the disability resulted from accidental means. It was not error to refuse to direct the jury to return a verdict for the defendant. In brief, the law of the case as made on the first appeal required the trial court to give the requested instruction which we have already quoted in full; and it is also the law of the case that evidence to the effect that the "wound" was inflicted by reason and as a result of the alleged altercation, and in the circumstances narrated by the plaintiff, is sufficient to support a judgment for the plaintiff.

The judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and BURNETT, JJ.,
concur.

Argued March 3, affirmed March 23, 1920.

BUTTON v. BUTTON.

(188 Pac. 180.)

Divorce—Cruelty Depends on Degree of Refinement of Person Affected.

1. Cruelty is a question of fact dependent upon the circumstances and individuals involved, and what would be cruelty to a delicate, sensitive woman might not be so to a brawling fishwife.

From Coos: JOHN S. COKE, Judge.

Department 1.

The parties to this case were married October 12, 1906, and have a daughter now of the age of nine years. The complaint charges the defendant with cruel and inhuman treatment and personal indignities toward the plaintiff rendering her life burdensome, making specifications not necessary to be quoted. The answer was a general denial without new matter.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. C. R. Wade*.

For respondent there was a brief over the names of *Mr. George P. Topping* and *Mr. I. N. Miller*, with an oral argument by *Mr. Topping*.

PER CURIAM.—The testimony indicates that the plaintiff was in poor health, on account of which she was somewhat querulous, and that the defendant was penurious and disputatious. Cruelty cannot be measured accurately like the dimensions of a solid body. It is a question of fact, dependent upon the circumstances and individuals involved. What would be cruel to a delicate, sensitive woman might not be so

to a brawling fishwife. The trial judge had before him the parties and witnesses in person, heard the testimony, saw the demeanor of the litigants, and had a far better opportunity to settle intelligently the question of fact involved than we can upon a paper record.

In substance, the decree of the Circuit Court granted a divorce to the plaintiff, gave her the custody of the minor child, declared her to be the owner in fee simple of one third of a small tract of land owned by the defendant, and required him to pay \$15 per month for the support of the child until further order of the court and while in the custody of the plaintiff, but allowed the defendant to visit the child at all proper and reasonable times, with the proviso that if the plaintiff became sick and unable to care for the child its custody should be transferred to the defendant until the plaintiff could again resume its care, the monthly payment not to be required during the continuance of the change of custody.

In our judgment, under all the circumstances, this is an equitable disposal of the issue and should be affirmed, without costs to either party.

AFFIRMED.

Argued December 23, 1919, affirmed February 3, former opinion approved and rehearing denied March 30, 1920.

OLDS v. HINES.*

(187 Pac. 586; 188 Pac. 716.)

Trial—Motion for Nonsuit in Effect a Demurrer to Evidence.

1. A motion for nonsuit is in effect a demurrer to plaintiff's evidence, an objection in purport that it is not sufficient to prove the allegations of the complaint, or to show that the plaintiff was entitled to recover.

Negligence—Contributory Negligence Question for Court When Only One Conclusion Possible from Evidence.

2. If there can be no reasonable conclusion other than that plaintiff himself was remiss in his duty at the time of the accident, it is incumbent on the court to so declare and order nonsuit.

Railroads—Nonsuit Properly Granted for Motor Truck Driver's Failure to Look at Crossing.

3. Where plaintiff, the driver of a motor truck going two miles per hour, testified that he looked when twelve feet from the track and did not see the approaching train, going thirty miles an hour, though it could have been seen 600 feet away, and did not look again until the front wheels of his truck were on the track with the train forty feet away, it was proper to grant a nonsuit instead of submitting the case to the jury.

Railroads—Continuous Vigilance Necessary at Crossing.

4. The duty of vigilance to avoid accident is upon a traveler continuously until he has crossed the track.

Railroads—Motor Truck Driver not Entitled to Priority at Crossing.

5. A motor truck driver has no right to claim the priority of passage at a crossing.

[As to accidents to automobiles at railroad crossings, see notes in Ann. Cas. 1913B, 680; Ann. Cas. 1915B, 767.]

Railroads—Motor Truck Driver's Duty at Crossing Defined.

6. The law demands of a motor truck driver going over a crossing a higher degree of care in proportion than it does of a pedestrian or a driver of a light vehicle drawn by a single horse.

ON PETITION FOR REHEARING.

Appeal and Error—Drawing of an Obvious Conclusion from Admitted Facts is not the Decision of an Issue of Fact.

7. Where the physical facts were such that at the relative speed of the motor truck which plaintiff was driving and together with

*On the question of care required of driver of automobile at railroad crossing, see notes in 21 L. R. A. (N. S.) 794; 29 L. R. A. (N. S.) 924; 46 L. R. A. (N. S.) 702.
REPORTER.

the speed of the train he must have seen the train which struck his truck had he looked, the action of the appellate court in so declaring is not open to objection as decision of a question of fact.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

The plaintiff, a young man about nineteen years of age, by his guardian *ad litem* in this action sues Walker D. Hines as director-general of the United States Railroad Administration, and Jones and Amundson, the engineer and fireman in charge of a train of the Spokane, Portland & Seattle Railway Company, for damages on account of an injury which he received in a collision between a train on that road and a motor truck which he was operating at the time. The accident occurred in the City of Portland where the railroad track crosses Fifteenth Street. The ground of negligence charged against the defendants is substantially that the train, consisting of a locomotive, tender and three passenger-coaches, was operated at a high, dangerous and reckless rate of speed, namely, at the rate of twenty-five miles an hour; and that the defendants neglected to keep a proper lookout for vehicles crossing on Fifteenth Street, or to warn the plaintiff by ringing a bell or blowing a whistle, or by any other means, of the the approach of the train. It is said substantially in the complaint that the men in charge of the engine could have seen the truck which the plaintiff was driving, as it was approaching and going upon the crossing, had they kept a proper lookout; and that there are no obstructions whatever between the crossing and five hundred feet along the track in the direction from which the engine was coming to the place of collision.

The answers of the several defendants traverse the complaint as to all charges of negligence and assert

that the plaintiff drove his truck upon the track without taking such precautions as a reasonably prudent individual under like circumstances would take to ascertain whether or not there was a train coming. This in turn was traversed by the reply.

At the close of the plaintiff's case the trial court entered a judgment of involuntary nonsuit against the plaintiff and he appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. F. M. De Neffe*, *Mr. Jay Bowerman* and *Mr. Martin L. Pipes*, with an oral argument by *Mr. De Neffe*.

For respondent there was a brief over the names of *Mr. Charles A. Hart* and *Messrs. Carey & Kerr*, with an oral argument by *Mr. Hart*.

BURNETT, J.—A brief *résumé* of the testimony is here set down: Fifteenth, Sixteenth and Seventeenth Streets in Portland run due north and south. The Spokane, Portland & Seattle Railway track on which the accident happened comes from the northwest on a slight curve to the left across these streets. There are some docks situated on the bank of the Willamette River near the foot of Fifteenth Street. The plaintiff was an experienced truckman and quite familiar with the crossing and the surroundings, having driven over the tracks there for about a year before the accident. On the day in question he had gone with a helper to the docks, loaded some heavy lumber upon the truck and started south along Fifteenth Street. There are several railway tracks between the dock and the place of the accident, two of which are main tracks, the one in question and another belonging to the Northern Pacific Railroad Company. The other tracks are

switch lines to various points on the river front. The distance between the Northern Pacific track and that of the Spokane, Portland & Seattle Railway where the accident happened is thirty-five feet. All the way between these tracks there is a clear and unobstructed view along the Spokane, Portland & Seattle track to Seventeenth Street, a distance agreed upon by the parties to be 600 feet. The train which injured the plaintiff was coming from the northwest along the Spokane, Portland & Seattle track toward Fifteenth Street. The plaintiff testified in substance that he was driving the truck very slowly on account of the roughness of the roadway; that he looked and listened twelve or fifteen feet away from the Spokane, Portland & Seattle track; that there was nothing in sight in either direction and that he went ahead. All this time he could see to the Seventeenth Street crossing. He said he was listening continually, was paying all of his attention to his driving, and was just moving. He knew at the time that the track was a main line and had seen main line trains passing on it many times. He was asked this question:

“And, seeing no train when you were twelve or fifteen feet away, then you did not look again, but listened?”

“A. I did not look, but I listened. I was putting all my concentration on my driving.

“Q. You were depending on your hearing, and you did not glance up at any time?”

“A. No, sir.”

He declared there was nothing to prevent his seeing the train if it had been there, and that he could see to the Seventeenth Street crossing. He states in substance that the first he saw of the train was when it was about twenty-five or thirty feet from the truck and at the time the front wheels of his truck were

just about going over the south rail of the track. The witness Carter said that the plaintiff was going not over two miles an hour. Doty, who rode with the plaintiff, thinks the truck was not going so fast as two or three miles an hour, that it was going slowly and could have been stopped instantly. Carter also stated that he saw the train thirty or forty feet from the truck and judged that the engine was going between twenty and thirty miles an hour. Harris first saw the engine before it struck the truck, about 125 feet from the crossing. Lillian Davidson, a typist who sat at an open window in the second story of a canning establishment near the scene of the accident, testified that she had a good view of the situation and first saw the train near the second post from the crossing. By the plat introduced in evidence this post is set down as 191 feet from the crossing. She said the train was going about thirty miles an hour and that when she looked the front end of the truck was just about beginning to go on the track. N. P. Jensen was traveling south, driving a truck on Seventeenth Street. As he approached the track from the north a flagman signaled him to stop when he was about fifteen feet from the track. Instead of stopping immediately as he could at the speed he was traveling, he coasted up to within about five or six feet from the track and halted there. He says that the train passed him immediately, going about twenty-five miles per hour. He explains that he did not wait for the last coach to go by, but as his custom is, as the first coach went by, he started his truck, so that he could pull right on back of the car, to save time. He testifies that when he started to go over the Seventeenth Street crossing, he looked towards Fifteenth Street and saw the Olds truck then about seven or eight feet back from the track. The

witness Yost was seated on his wagon some distance east of the crossing and saw the train coming just prior to the collision, as he says, traveling about thirty miles an hour.

1, 2. A motion for nonsuit is in effect a demurrer to the plaintiff's evidence, an objection in purport that it is not sufficient to prove the allegations of the complaint, or to show that the plaintiff was entitled to recover. It is also true as a rule of law that if the evidence of the plaintiff when fairly judged from the standpoint of a reasonable man shows that he himself was guilty of negligence which contributed to his injury, he cannot recover. We remember also that it is a binding principle that the plaintiff is entitled to the benefit of whatever his testimony tends to prove, although his witnesses may contradict each other, and that if any reasonable construction of the evidence on his behalf, or any part thereof, shall fairly tend to show that he is entitled to recover, it is the duty of the court to submit the question to the jury. On the other hand, if there can be no reasonable conclusion other than that the plaintiff himself was remiss in his duty at the time of the accident, it is incumbent upon the court so to declare, and order a nonsuit. The judge cannot evade his duty by sending such a case to the jury, thus inviting it to render a verdict which would be clearly against the testimony.

3. One of the principal questions in the case is whether or not the train was in sight of the plaintiff in time for him to stop in safety before going upon the track. We must bear in mind that he says he looked both ways along the track, with an unobstructed view as far as Seventeenth Street, a distance of 600 feet, when he was yet twelve or fifteen feet back from the Spokane, Portland & Seattle track, but that he did

not look again until the front wheels of his truck were on the track and the train was within thirty or forty feet of him. The complaint declares that there was no obstruction to the view and that the men in charge of the train could easily have seen the truck Olds was driving as it approached the crossing. Granting this, it is equally true that the plaintiff could just as easily have seen the train approaching. If they were negligent in not seeing him, by the same rule he was negligent in not seeing the train they were operating.

The lowest rate of speed at which the plaintiff was traveling as given in figures by the testimony is two miles per hour. At this rate it would require five seconds for him to travel the fifteen feet to the railroad track. The greatest rate of speed charged to the train by any of the witnesses, most indicative of negligence on the part of the defendants in that respect, is thirty miles per hour. This is at the rate of forty-four feet per second. Thus we have a case where the plaintiff travels five seconds to the point of collision. During that same five seconds the train had traveled at the rate of forty-four feet per second, making a total of 220 feet. This calculation makes it mathematically certain that the train was east of Seventeenth Street, or within the 600 foot space which was in clear view by the plaintiff at all times. This result is corroborated by the testimony of Jensen, who saw the plaintiff's truck seven or eight feet from the crossing after the train had passed him at Seventeenth Street. It is also corroborated by the testimony of Miss Davidson, who first saw the train 191 feet from the crossing, as the front end of the truck was about to go upon the track. The only conclusion to be drawn from the testimony, therefore, is that as a matter of fact the train was plainly visible in the 600 foot space at the

time the plaintiff says he looked in that direction and saw nothing. Does this present a question for the jury and relieve the judge of the responsibility of deciding the case on a motion for nonsuit?

In *Young v. Chicago, R. I. & P. Ry. Co.*, 57 Kan. 144 (45 Pac. 583), we have substantially a parallel case. The plaintiff was a young woman twenty-three years of age, driving a one-horse buggy with the top down. The track of the Atchison, Topeka & Santa Fe Railroad and that of the defendant company were about 75 to 100 feet apart.

"She testified that she crossed the Sante Fe track, and knew that the Rock Island train was about due, and when between the two tracks she looked and listened three or four times for the Rock Island train, and the last time, when about ten or fifteen feet from the track, she stopped and looked and listened for the train, but she did not see or hear it, although she saw the whistling-post on the side of the track, eighty rods away. She stated that she was driving in a slow walk, not as much as three or four miles an hour, but the horse and buggy were struck by the train although she had not seen it at all."

The undisputed fact was, as disclosed by her own evidence, that the train was in very truth there on the track where it struck her. The court said:

"If several minds might reasonably arrive at different conclusions respecting the question of reasonable care of the plaintiff in crossing the track, then the case ought to have been submitted to the jury; but this is not such a case."

The court then quoted from *Artz v. Railroad Co.*, 34 Iowa, 153, thus:

"It is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train; but did not; and that this testimony shows that he was not guilty of contributory

negligence, or, at the very least, it made that a question of fact for the jury. The difficulty, however, with the position is that, the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes, therefore, no conflict."

Railway Co. v. Elliott, 28 Ohio St. 340, 355, says:

"It is nothing to the purpose that he should say he looked this way and that, when the object he seeks to discover is plainly and palpably before him, and he fails to see it. Either his statement is not true or his exercise of vision was such as to be not only negligent, but culpable."

In *Railway Co. v. Hedges*, 118 Ind. 5, 11 (20 N. E. 530, 533), it is said:

"The law presumes that one having the ordinary sense of sight must have seen that which was within the range of his vision, if he gave attention and looked; and if he saw the train approaching, and pursued his way notwithstanding, he is to be regarded as taking the risk upon himself."

Other cases to the same effect are *Kelsay v. Railroad Co.*, 129 Mo. 362 (30 S. W. 339); *Lake Erie & W. Ry. Co. v. Stick*, 143 Ind. 449 (41 N. E. 365); *Bornscheuer v. Consolidated Traction Co.*, 198 Pa. 332 (47 Atl. 872); *Payne v. Chicago & A. R. R. Co.*, 136 Mo. 562 (38 S. W. 308); *Hudson v. Rome etc. Ry. Co.*, 145 N. Y. 408 (40 N. E. 8); *Medcalf v. St. Paul City Ry.*, 82 Minn. 18 (84 N. W. 633); *Hunter v. New York etc. Ry.*, 116 N. Y. 615 (23 N. E. 9, 6 L. R. A. 246).

In *Wolf v. City Ry. Co.*, 50 Or. 64 (85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181, 50 Am. & Eng. R. R. Cas. (N. S.) 213), this court, speaking by Mr. Justice MOORE, approved the doctrine that:

"Where the undisputed circumstances show that the testimony of a witness is so impossible or unreasonable

that a fair mind must reject it, the court must withdraw such testimony from the jury."

It is true that in that case the opinion goes on to show that the testimony there involved is not within the rule, but the precept itself is the doctrine of this court. The Wolf case is annotated at length in 15 Ann. Cas. and a great wealth of authority is cited to this point, that where a train was in fact in plain sight, the testimony of a witness to the effect that he looked but saw no train is incredible and presents no issue to be submitted to the jury. In other words, under such circumstances the testimony is to be treated as if the witness had not looked at all, when he had opportunity and should have looked. This distinguishes the present case from *Hecker v. Railroad Co.*, 40 Or. 6 (66 Pac. 270, 23 Am. & Eng. R. R. Cas. (N. S.) 33), which is relied upon by the plaintiff. The substance of the doctrine there taught is that the law does not lay down as a hard-and-fast rule that the injured individual shall have looked at any particular distance from the track. In that case the testimony shows that the traveler was engaged at the very time in both looking and listening for the coming of a train. The track was partially obscured in both directions. The plaintiff had just looked towards the east without seeing any train and had begun to look westward along the track when the train from the east caught him. The court held this to be sufficient to take the issue to the jury. Here, although "crawling" along, as the plaintiff says, when he could stop instantly, he suspended looking and did not look the second time until he had got into the zone of absolute danger. The circumstance that the train, according to the mathematics of the situation, was in very truth in plain sight of him at all times, compels the construction of his testimony to the effect that he

either did see it in fact, or so negligently used his vision as to make him culpable in bringing on the collision. It is almost a platitude to say that in such cases a party is bound by what he actually saw or by the exercise of ordinary prudence could have seen; or, as stated in *Southern Ry. Co. v. Jones*, 106 Va. 412 (56 S. E. 155):

“If there is any point at which, by looking and listening, a person injured could have avoided the accident, and he failed to do so, then his contributory negligence defeats a recovery for the injury. If he could have seen and did not see an approaching train, then he failed to discharge the duty which the law imposes.”

4, 6. If the trainmen could have seen the plaintiff, as he says they could, equally well could the plaintiff have seen the train. In crossing a railroad track, itself intrinsically a place of danger, the duty of vigilance to avoid accidents is incumbent upon the traveler continuously until the danger is past; that is to say, until he has crossed the track. For the reason that the train has the right of way and must have it in order properly to conserve the safety and convenience of the traveling public, the truck driver has no right to claim priority of passage. His own vehicle is self-propelled and controllable within very narrow limits. Its collision with a train is fraught with danger to many people. Accordingly, the law demands of the truck driver a higher degree of care in proportion than it does of the pedestrian or the driver of a light vehicle drawn by a single horse. In effect, by his complaint the plaintiff demands that because the trainmen might have seen him and ought to have seen him in plain view, it was their duty to give him priority of passage. This is not the law.

We have purposely avoided considering whether or not the defendants were negligent. We dismiss that

feature by saying that there was evidence sufficient to take that branch of the case to the jury. The case is decided upon the principle that the admitted facts plainly and mathematically contradict the bare statement of the plaintiff that he looked and saw nothing, and practically demonstrate contributory negligence on his part preventing his recovery. The trial judge saw his legal duty in the premises and had the courage to perform it, instead of passing it to the jury. His action is approved and the judgment affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Former opinion approved and rehearing denied March 30, 1920.

PETITION FOR REHEARING.

(188 Pac. 716.)

Department 1.

On petition for rehearing. Former opinion approved and rehearing denied.

AFFIRMED. REHEARING DENIED.

Mr. F. M. De Neffe, Mr. Jay Bowerman and Mr. Martin L. Pipes, for the petition.

Messrs. Carey & Kerr and Mr. Charles A. Hart,
contra.

BURNETT, J.—The burden of the plaintiff's contention in his petition for rehearing is that the former opinion undertook to control the testimony of the plaintiff himself by the testimony of other witnesses as to the

visibility of the train before it struck the plaintiff, and that thereby the court assumed to decide a question of fact. The only object in reciting the declarations of the witnesses was to verify the conclusions reached from an analysis of the plaintiff's own testimony. Neither does the opinion intimate that the plaintiff was bound to prove his freedom from negligence.

The design of the former opinion in computing the situation of the train was to assume as a hypothesis the figures most favorable to the plaintiff as disclosed by the testimony. It will be remembered that some witnesses gave figures in their estimate of the speed of the truck and of the train. There was testimony, of course, that the truck was not moving so fast as two or three miles per hour, but its lowest actual figured rate given was two miles per hour. On the other hand, the most rapid speed of the train as stated in the testimony, that at which it would most likely come upon the plaintiff unawares, was thirty miles per hour. Analyzing the plaintiff's statement that there was no train on the 600 feet of track over which he had unobstructed vision when he looked at 15 feet from the rails, we find that at 30 miles per hour the train would occupy 13.63 seconds in traversing that 600 feet to the point of collision. In that same 13.63 seconds in traveling at 2 miles per hour the truck would cover 39.52 feet, whereas it was only 15 feet to the rails, and the plaintiff's statement is that the locomotive struck the front wheels of his truck, slued it around and carried it along, leaving it substantially parallel with the track, about 25 feet from the crossing. If we increase the speed of the truck to 3 miles per hour it would carry it 59.97 feet while the train traveled the 600 feet at 30 miles per hour. In other words, at that rate the

truck would have cleared the crossing before the arrival there of the train.

Bearing in mind that thus far we are dealing with the figures given in the testimony for the plaintiff and in the most favorable construction of them on behalf of the plaintiff, the conclusion is mathematically inevitable that the train was in the 600 feet open space and visible to the plaintiff, if he had glanced in that direction at any time immediately before he came upon the track. His own testimony is that he did not look again after looking at 15 feet from the rails, until his fore wheels were between the rails. It is undisputed that the locomotive struck him. This could not have happened unless the train was there. If we decrease the speed of either the truck or the train or of both of them, it makes it all the worse for the plaintiff's case, because it lengthens the time during which he says he did not look, thus intensifying his negligence. No reasonable man can rightfully say that the train could have traversed the 600 feet of open view without plaintiff's seeing it if he had looked, and that if he was barely moving as he says, he could not have stopped in time to let the train pass in safety to himself.

Stafford v. Chippewa Valley Electric R. Co., 110 Wis. 331 (85 N. W. 1036), is substantially a parallel case except that the plaintiff was traveling in a horse-drawn vehicle. The court there said:

"The idea that the car moved from a point where it was out of sight from plaintiff's point of view when she looked, to where it was when the horses became frightened, a distance of some 275 feet, while the horses traveled but about 20 feet, making the speed of the car somewhere about 50 miles per hour or twice as great as the most extravagant testimony of plaintiff's witnesses puts it, is as well within the bounds of the ridiculous, we venture to say, as anything that has heretofore

received serious consideration by a trial court or jury. * * Either the observation was not taken and the testimony to the contrary is false, or the car was seen and the testimony the other way is false, and the accident occurred in the driver of the horses attempting to cross the track regardless of the danger, depending upon the vigilance of the motorman to stop his car before reaching the wagon. * * It should be kept clearly in mind that courts and juries go beyond their legitimate sphere by deciding that a fact exists which is contrary to all reasonable probabilities, and that such is the case no matter how many witnesses testify to the existence of such facts. The testimony of the plaintiff that she looked for a coming car when it must have been plainly in view, yet did not see it, cannot be true consistent with possession by her at the time with the capacity for seeing, as to which there is no question."

We quote from the petition for rehearing in the case at bar:

"We do not mean to deny the rule established by the cases cited by the court that, if the physical fact exists and the object looked for is in fact in plain sight, the plaintiff will not be heard to say that he did not see it. * * In such cases the courts hold that there is no conflict of fact in the case, since the laws of nature are facts which must be accepted, human testimony to the contrary notwithstanding. But in order to apply that rule the physical fact relied on to discredit plaintiff's evidence and the evidence of his own eyes, must be a fact uncontroverted by him and incontrovertible by him. * * It must be conceded, stipulated, admitted by the plaintiff himself, or deduced inevitably from facts which he admits or swears to. There is, then, a clear distinction between a case where the plaintiff swears he did not see a train which *his own testimony shows was there*, and a case where the plaintiff swears he did not see the train because it was not there in fact."

The only reasonable deduction from the phenomena described by the plaintiff is that the train was there in

plain sight. If it was not, he would not have been hurt.

Commenting on the quotation from *Wolf v. City Ry. Co.*, 50 Or. 64 (85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181, 50 Am. & Eng. R. R. Cas. (N. S.) 213), here set down:

“Where the undisputed circumstances show that the testimony of a witness is so impossible or unreasonable that a fair mind must reject it, the court must withdraw such testimony from the jury,”

—the petition intimates that the former opinion overlooked the word “undisputed” in the excerpt. In this critique counsel have failed to distinguish between “undisputed circumstances” and impossible oral declarations. The undisputed circumstances in the instant case are that the plaintiff was approaching a track where the view was unobstructed for 600 feet; that he did not look after passing a certain point; and that the train came along the track and struck him. It is utterly unreasonable and contrary to the very facts upon which he relies for recovery, to say that the train was not in sight. Such oral declarations, when compared with the actual, admitted physical happenings present in the case, are nullities and are to be treated as if they had not been uttered.

In arriving at this result we have not opposed witness against witness or decided a question of fact. We have only pointed out the reason inherent in the plaintiff's own statement, taken altogether, why his oral declaration that there was no train in sight cannot possibly be true when compared with the “undisputed circumstances” upon which his case depends. As to the rate of speed of his truck which was taken as a basis of calculation, it was one of those named in the testimony, and the aim was to demonstrate that

at that rate the train must have been in sight at the time the plaintiff last looked for it, and that this would be true no matter how much slower he traveled. Any greater speed indicated by the testimony would have taken him across the track ahead of the train.

The only reasonable conclusion to be drawn from the testimony, giving it the strongest possible effect for the plaintiff, is a dilemma: On the one hand, he looked and did not see the train plainly visible upon the track; or, on the other, having looked, he dawdled on his way to the track or "barely crawled" as he says, without looking, so that the train came upon him when he might have stopped instantly at any time before he reached the track if he had looked as he ought. "*Incidis in Scyllam cupiens vitare Charybdim.*"

The petition for rehearing is denied.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued January 15, reversed and dismissed February 17, opinion modified on rehearing March 30, 1920.

HANER v. EUGENE.*

(187 Pac. 841; 188 Pac. 711.)

Municipal Corporations—Abutting Owner Liable to Assessment for Curbing, Though Other Curbing Previously Existed.

1. Where a municipality through proper procedure directed the paving of a street at a given width, there was a manifest intention to have a uniform curbing, that is, one adjoining the paved way, and plaintiff, an abutting property owner, cannot escape liability for curbing because one of his predecessors had constructed a sidewalk and curb in front of the premises; such curbing having been constructed on the theory that the street would have a considerably greater width than that at which it was paved.

*The question of assessment of costs of local improvement made under municipal authority against abutting owner who has made improvement on his own initiative is discussed in a note in 28 L. E. A. (N. S.) 877. REPORTER.

Municipal Corporations—Plans Made Part of Paving Notice by Reference.

2. Reference to plans in notice of paving held to make plans part of notice as effectually as if they had been copied therein.

Municipal Corporations—Publication of Improvement Notice Binding on Property Owner.

3. Where there was no irregularity in the publication of notices and an ordinance directing paving, such notice is binding on a property owner, though he had no actual knowledge.

ON PETITION FOR REHEARING.**Municipal Corporations—Existence of Old Curb not Conforming to New Plan Held not Defense to Assessment, Including New Curb.**

4. In a suit to cancel a special street paving and curbing assessment, the fact that a curb had previously been constructed in front of plaintiff's premises by plaintiff's predecessor in accordance with an alleged plan authorized by the city, constituted no defense, where under the contemplated improvement such curb would not be in line with the new curb; there being nothing to show that the city had authorized its construction, or the order of the city engineer under which it was constructed.

Municipal Corporations—Encroachment of Retaining Wall Held not to Invalidate Entire Assessment.

5. In a suit to cancel a street-paving assessment, that a retaining wall to some extent encroached on private property thus increasing the expense of the improvement, did not constitute a ground for declaring the whole improvement invalid, although the objecting taxpayer would be entitled to an abatement of so much of his assessment as went into that part of the structure which extended beyond the exterior boundaries of the street, particularly where such reduction was not the object of the suit.

From Lane: JAMES W. HAMILTON, Judge.

Department 2.

This is a suit instituted by the respondent for the purpose of canceling and setting aside a special assessment made upon his property by the City of Eugene, for the improvement of Alder Street in front of his property. The improvement is the same discussed in *Gamma Alpha Bldg. Assn. v. Eugene*, 94 Or. 80 (184 Pac. 973), and several of the questions raised on this appeal are settled in that case.

The errors in the proceedings which respondent claims rendered the assessment void are substantially

that there was an attempt to assess plaintiff's property for the construction of a retaining wall fronting upon the ditch of the Chambers Power Company where Alder Street approaches the same, which contention is stated and discussed in the case above referred to.

Another error in the proceedings is predicated upon the statement that there was no notice of an intention on the part of the city to improve the street by curbing in front of plaintiff's property.

Another alleged error in the proceedings is the inclusion in the special assessment of a 5 per cent charge for engineer's services. This feature of the case was also discussed and settled in *Gamma Alpha Bldg. Assn. v. Eugene*, 94 Or. 80 (184 Pac. 973).

Another alleged defect is stated as follows:

"The notice to the contractors and property owners stated that the successful bidder would be required to give an additional bond, equal to 25 per cent of the total price, guaranteeing the repair of the pavement for a period of five years against defects in pavement due to proper and ordinary use as a street. From this notice it will be presumed that the cost of the improvement is thereby increased and the assessment is therefore void."

The court found for the plaintiff, and the defendant appeals.

REVERSED AND DISMISSED.

For appellant there was a brief and an oral argument by *Mr. O. H. Foster*.

For respondent there was a brief and an oral argument by *Mr. R. S. Hamilton*.

McBRIDE, C. J.—The contentions in regard to the retaining wall, the 5 per cent for engineer charges, and the covenant to keep in repair for five years, were dis-

cussed and settled in *Gamma Alpha Bldg. Assn. v. Eugene*, 94 Or. 80 (184 Pac. 973), and that decision was adverse to the contentions made in this suit. For our views in regard to these we refer to that opinion, to which we still adhere.

1. The legality of the assessment for curbing in front of plaintiff's property is the only objection to the assessment not disposed of in the previous opinion. The contention arises in this way:

By Ordinance No. 1406 the council declared its intention to improve Alder Street. Section 1 of the ordinance is as follows:

"The Common Council of the city of Eugene does hereby declare its intention to improve Alder Street from Eleventh Avenue North to the mill race by paving said street between said points with asphaltic concrete pavement twenty-four (24) feet in width.

"That said street shall be paved between said points with asphaltic concrete pavement having a concrete base of four (4) inches in thickness and an asphaltic concrete wearing surface two (2) inches in thickness. There shall be spread over said concrete base a paint coat and there shall be spread on the wearing surface a quick drying bituminous flush composition.

"The Common Council does hereby further declare its intention to improve said street between said points by the construction of uniform cement curbing along either side thereof, where none now exists, and the improvement of said street shall include all necessary inlets, drains, catch-basins and embankments, and excavations, and retaining walls."

In due time the required notice was published, the material parts of which are as follows:

"Notice is hereby given to contractors and property owners along Alder Street from Eleventh Avenue north to the Mill race in the city of Eugene, that under the terms of Ordinance No. 1406, passed by the Common Council September 29, 1913, and approved by the

Mayor on the 2nd day of October, 1913, bids will be received until 7:30 o'clock P. M. October 13, 1913, at the Recorder's Office in the city of Eugene, at which time and place said bids will be opened and considered for the improvement of said street between said points by paving said street a width of 24 feet with asphaltic concrete pavement having a concrete base 4 inches in thickness and an asphaltic concrete wearing surface 2 inches in thickness and paint coat and quick drying bituminous flush composition and by the construction of cement curbing along either side of said street where none now exists and by the construction of all necessary inlets, drains, catch-basins, embankments, excavations and retaining walls. Said improvement shall be completed within 30 days from the date of letting the contract therefor. All of the work required for said improvement shall be let in one contract and will be let to the lowest responsible bidder. The work shall be done in accordance with the plans and specifications of the City Engineer filed in the office of the City Recorder and in accordance with the terms of said Ordinance No. 1406."

There is no claim that either the ordinance or the notice were in any way irregular in form or substance. Previous to this proposed pavement plaintiff's predecessor in interest had constructed a sidewalk and curb in front of the premises now owned by plaintiff, but such walk and curb had been constructed upon the theory that the street would be paved to a width of 34 feet, and when the paving was actually restricted to a width of 24 feet, the curbing would not be uniform with the curbing on the rest of the street.

We think plaintiff's position untenable. The manifest intention was to have a *uniform* curbing, that is: One adjoining the paved way, and not a curbing with a jog in front of property which had theretofore been voluntarily improved.

2. The notice to owners and contractors followed the description in the ordinance, but added this important paragraph:

“The work shall be done in accordance with the plans and specifications of the city engineer filed in the office of the City Recorder and in accordance with the terms of said Ordinance No. 1406.”

This reference, in point of law, made these plans a part of the notice just as effectually as if they had been copied in full thereon, and on these plans is shown a curb immediately next to the 24-foot pavement.

3. The plaintiff, who resides at Bend, Oregon, testified that he had no actual notice of the improvement, or any notice beyond that implied by the publication of these notices and the Ordinance, but there being no irregularity in these, they are of course binding upon him.

This disposes of every objection not considered in the former case, and upon the authority of that case and the finding here that the objection to the assessment for curbing is not well taken, the decree of the circuit court will be reversed and the suit dismissed.

REVERSED AND DISMISSED.

BEAN, JOHNS, and BENNETT, JJ., concur.

Modified on petition for rehearing March 30, 1920.

PETITION FOR REHEARING.

(188 Pac. 711.)

Original opinion modified on rehearing and decree rendered. REVERSED. DECREE RENDERED.

Mr. R. S. Hamilton, for the petition.

Mr. O. H. Foster, contra.

McBRIDE, C. J.—In his able and ingenious brief upon the petition for rehearing, counsel for plaintiff renews his attack upon the sufficiency of the notice of the proposed improvement. This notice, which is quoted in the original opinion, states that the improvement will be made in accordance with the plans and specifications on file in the office of the city engineer, and thereby these plans and specifications were imported into the notice and became a part thereof, to the same extent as if they had been particularly described and set forth at large therein. These plans and specifications are before us and are exactly in accord with the work as performed; the retaining wall being shown in detail thereon.

It is claimed that the testimony of Mr. Wagoner, a former city engineer, shows that the old curb placed in front of plaintiff's premises was placed there by authority of the city, and that the narrowing of the pavement to 24 feet, instead of 34 feet, constitutes a change of the plan of improvement, and that plaintiff's predecessor having complied with the requirement of the original plan, plaintiff cannot be again assessed because of a change in the nature of the improvement.

4. There is nothing in the evidence to show that, prior to the present improvement, the street had ever been improved or ordered to be improved by the city; nor that any plan of improvement had been theretofore adopted by the city. No previous ordinance declaring any intention to improve the street, or notice of such intention, were introduced and, presumably, none exist. The width to which the street might be paved in the future was necessarily a matter of mere speculation, so far as the city engineer was concerned, and no authority is shown to have existed in him to fix the location of the old curb. He and plaintiff's predecessor in interest made a guess as to the width to which the council would improve the street, and the guess proved a wrong one.

So far as the record or testimony outside of the record is concerned, there is nothing to show that the old curb was constructed by any mandate of the city, or that its construction was other than a mere voluntary act. In addition to this, had the present improvement been extended to the width of 34 feet, so as to comply with the then existing curb, the additional paving, at the rate at which the contract was let, would have cost plaintiff about \$20 more than the cost of constructing a new curb.

5. It is also suggested that the retaining wall extends laterally two feet on each side over and upon private property, and the testimony indicates that such may be the case. Whether this was with the consent of the owners of such property does not appear. The extra expense of this extension beyond the exterior line of the street, so far as this plaintiff is concerned, is, comparatively, infinitesimal. No specification of this objection is made in the complaint, and it only crops out incidentally in the testimony. At the most

it would not furnish ground for declaring the whole improvement invalid, but, in equity, it would entitle the plaintiff to an abatement of so much of his assessment as went into that part of the structure, which is beyond the exterior boundaries of the street. A careful computation places this amount at the sum of \$16. It is evident that this reduction was not the object of the suit, and that in every substantial particular the plaintiff is defeated here.

In consideration of the premises the decree of the Circuit Court will be reversed, and a decree entered here, declaring the assessment against plaintiff's property valid to the extent of \$566.74, and directing the city to proceed to collect that sum, as upon an original assessment for that amount. Defendant will recover its costs and disbursements in the lower court and neither party will recover costs and disbursements in this court.

ORIGINAL OPINION MODIFIED. DECREE RENDERED.

BEAN, JOHNS and BENNETT, JJ., concur.

Argued March 2, affirmed March 30, 1920.

STOTT v. J. AL. PATTISON LUMBER CO.

(188 Pac. 414.)

Trespass—Treble Damages Allowable, Though not Claimed in Complaint.

1. The court can award treble damages under Section 346, L. O. L., as amended by Laws of 1917, page 742, for cutting timber, though treble damages are not claimed in the prayer of the complaint, at least where the award of treble damages is less than the sum prayed for in the complaint.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 1.

This is a suit brought to restrain defendants from cutting and removing timber upon plaintiffs' land, and to recover damages for the cutting and removal of timber theretofore taken. The complaint alleged the ownership in plaintiffs of the land and timber in controversy; alleged that upon the land was a grove of fine oak trees which, from their location, made the premises valuable as a park and that by reason thereof the trees had a value greater than that which they would have, if sold for the purposes of being converted into lumber or cordwood. By appropriate allegations the complaint charged a willful and continuing trespass by defendant and alleged that defendant had willfully and wrongfully cut down and removed a portion of the timber, and was engaged in cutting and removing the remainder, to plaintiffs' damage in the sum of \$2,500, and that unless restrained defendant would continue to cut and destroy the grove, and thereby depreciate the value of plaintiff's property. There was a prayer for an injunction as to further trespass, and for \$2,500 damages for timber already cut.

Defendant answered, denying plaintiffs' ownership of the property, and alleging that it had purchased the timber of the owners thereof for the purpose of filling contracts made by it with certain shipbuilding firms; admitted removing a part of the timber, and claimed the right to remove the remainder. There were other allegations in the answer, not material to the matters herein, and the cause being put at issue by a reply, the case was heard and general findings made in favor of plaintiffs, as to the ownership of the land and timber, and the following finding as to the nature of the trespass:

“That on or about the 22d day of May, 1918, defendant, acting through its officers, agents and servants, and without the knowledge, consent or permission of plaintiffs, or either of them, and without lawful authority, trespassed and went upon said premises of plaintiffs and wantonly cut down and removed a large number of said oak trees so constituting said grove, and removed the greater portion of said timber so cut therefrom and converted the same to its own use. That said defendant cut a strip nearly through the center of said oak grove, thereby injuring and destroying to a large extent its usefulness as a park and shade and shelter for cattle and stock, and for ornamental purposes, and thereby depreciated the value of plaintiffs’ said property and damaged plaintiffs in the sum of \$400.”

As conclusions of law the court found that the defendant should be restrained from further trespassing upon the premises, and that plaintiffs were entitled to a judgment for \$1,200, being treble the amount of damages assessed, and a decree to that effect was entered, from which defendant appeals. **AFFIRMED.**

For appellant there was a brief submitted over the name of *Mr. Alfred P. Dobson*.

For respondents there was a brief and an oral argument by *Mr. John H. Hall*.

McBRIDE, C. J.—1. This appeal presents but one question, and that question in a single form, namely: Could the court decree treble damages under Section 346, L. O. L., as amended by Gen. Laws 1917, p. 742, where such treble damages were not claimed in the prayer of the complaint? The section referred to provides as follows:

"Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city, against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed therefor, as the case may be; provided, that in any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the aforementioned acts, it shall be *prima facie* evidence that such acts were done and committed by defendant wilfully, intentionally and without plaintiff's consent."

This matter has never been passed upon in this court. Defendant cites but one case in support of its contention: *Neff v. Pennoyer*, 3 Sawy. 498 (Fed. Cas. No. 10,085), in which Judge DEADY remarks:

"To entitle the plaintiff to recover treble damages, judgment therefor must be demanded in the complaint so that defendant may be apprised of the claim and the facts stated must bring the case within the statute."

It is evident from a perusal of that opinion that the remark was casual. Counsel for plaintiffs expressly disclaimed any intention to ask for treble damages. Of the cases cited as sustaining the rule announced, *Chipman v. Emeric*, 5 Cal. 239, and *Mooers v. Allen*, 2 Wend. (N. Y.) 247, seem to support the *dictum* of the court.

These are old cases and the statutes under which they occurred are not before us, but it would seem sufficient under our statute to state the facts necessary to authorize a recovery for treble damages. The

statute seems to negative the theory that treble damages should be affirmatively claimed in the complaint. It reads, "Judgment shall be given for treble the amount of damages *claimed* or *assessed*." Here the complaint alleges every fact necessary for a recovery of treble damages, except that it does not refer to the particular section authorizing the assessment. In the infancy of code procedure, courts were exceedingly jealous of innovations upon the common law, and required a much stricter rule of pleading than now prevails, where a large portion of our remedies are statutory.

The damages awarded were less than the sum prayed for in the complaint; what would be the result, had they been greater, it is needless to discuss here. The later cases seem to hold that, if the complaint sets forth the facts authorizing treble damages, a reference to the statute or a distinct claim for such damages is unnecessary.

Black v. Mace, 66 Me. 48, is substantially parallel to the case at bar. In that case it was held that a statute similar to ours was remedial, and not penal, and that it was not necessary to plead the statute or claim treble damages as such.

To the same effect is *Snelling v. Garfield*, 114 Mass. 443, and cases there cited. The Massachusetts statute is almost identical with our own, and the case referred to is exactly in point.

The decree of the Circuit Court is affirmed.

AFFIRMED.

BURNETT, BENSON and HARRIS, JJ., concur.

Motion to dismiss appeal submitted March 23, appeal dismissed
March 30, 1920.

BAILLIE v. COLUMBIA GOLD MINING CO.

(188 Pac. 418.)

Appeal and Error—Mandamus—Order Requiring Defendants to Return Corporate Records to the State and Produce Them in Court not Appealable.

1. An order, requiring defendants to return the corporate records of one of the defendants, including certain records specified, to the state and bring them into court for inspection and use on the trial, and to keep them in the state for such inspection, was not appealable under Section 548, L. O. L., as an order determining the action or suit so as to prevent a judgment or decree, or any other provision of that section, or as an order amounting to a peremptory writ of *mandamus*.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

The principal case was before this court on appeal and is reported in 86 Or. 1 (166 Pac. 965, 167 Pac. 1167). In the opinion this court adverted to the fact that the books of the Columbia Gold Mining Company had been sent out of the state, after an order had been passed enjoining defendant Richardson from removing them, and called attention to their value to plaintiff as testimony, commenting severely upon the conduct of the defendant Richardson in removing them and conspiring with Backus & Brooks in deceiving the court on the trial as to their whereabouts, suggesting that upon a retrial—

“A mandatory injunction should issue, requiring the Columbia Gold Mining Co. to return its records to this state and keep them here for inspection, as required by Section 6694, L. O. L.”

Acting probably on this suggestion, the plaintiff, in his amended complaint, prayed for such an injunction,

but nothing seems to have been done in the premises until the case came on trial, when the court—upon motion made in open court, defendants' attorney being present—made an order reciting that prior to the trial notice had been duly served upon defendant Mining Company to produce said corporate records, and that they had not been produced, and that it appeared from the records and files of the court on the former trial, that since the commencement of this suit and prior to the former trial, said records were in the office of the defendant company in Minneapolis, State of Minnesota, and that said defendant Harris Richardson then and there, as such attorney, had access to said records and examined the same, and that as such attorney he produced and offered in evidence before the referee, before whom the testimony was taken, detached portions of said corporate records, etc. It was therefore ordered—

“That said defendant, Columbia Gold Mining Company, and its said attorney, Harris Richardson, be and are, and each of them is, hereby directed and required to bring, or return, or cause to be brought or returned, to this state and into this court, within ten days from the date hereof, for inspection and use in the trial of said cause, and to keep for such inspection in this state, all the corporate records of said defendant, Columbia Gold Mining Company, including therein all its records of meetings of its stockholders and of its board of directors, and its stock books and records showing the names of the original stockholders, their respective shares, the amounts paid, the amounts due therefor, if any, and all transfers thereof, by whatever names such books or records may be designated.”

The defendant company appeals from this order, and the plaintiff moves to dismiss the appeal.

APPEAL DISMISSED.

Messrs. Smith & Smith, Mr. J. H. Nichols and Mr. John L. Rand, for the motion.

Mr. M. D. Clifford and Mr. Harris Richardson, contra.

McBRIDE, C. J.—The order is not appealable.

Section 548, L. O. L., is as follows:

“ * * An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein. * * ”

The order did not “determine the action or suit so as to prevent a judgment or decree therein.” Nor does it come within any other of the causes upon which the section quoted predicates a right of appeal. It was purely interlocutory and could only be reviewed here, if at all, upon a final appeal bringing up the whole case.

It is claimed the order amounted to a peremptory writ of *mandamus*, but an examination of our *mandamus* statute discloses very slight resemblance between that proceeding and the course pursued here. While the complaint asked for a “mandatory injunction,” the order actually made amounted to no more than the one usually made against a reluctant defendant, who refused to produce documents required by the opposing party for use on the trial.

The appeal is dismissed. APPEAL DISMISSED.

Argued March 3, affirmed March 30, 1920.

HORNIG v. CANBY.*

(188 Pac. 700.)

Master and Servant—Compensation Act not Applicable to Municipality; "Employer."

1. A municipality was not an employer within the Workmen's Compensation Act in force December 23, 1916.

Municipal Corporations—Ordinance Unnecessary for Hiring Employee.

2. A charter provision, relieving a town from liability on a contract not authorized by city ordinance and made in writing, applies only to contracts for work to be let after notice, and does not require an ordinance for a contract authorizing the engineer of the town waterworks to employ his father in his absence.

Evidence—Parol Evidence can Add to Minutes of Contract of Hiring of Municipal Employee.

3. Where the council minutes recited merely the appointment of a waterworks engineer, oral evidence was admissible to show an agreement that the engineer might procure the services of his father when he was absent.

Master and Servant—Evidence Held Sufficient to Take Question of Employment to Jury.

4. Minutes of a council meeting, appointing plaintiff's son as waterworks engineer, and oral testimony that it was agreed at the meeting that the son might employ plaintiff in his place when absent, held sufficient to take to the jury the question whether or not plaintiff was an employee of the town when injured.

Master and Servant—Finding of Negligence Held Warranted.

5. Where plaintiff was injured by his clothing catching on the key which fastened the fly-wheel to its shaft near the pulley he was adjusting, the jury could find the employer negligent in violating the Employers' Liability Act, which required it to use every care and precaution which might have been used without impairing the efficiency of the machinery to protect employee from injury.

From Clackamas: GEORGE G. BINGHAM, Judge.

Department 1.

The substance of the complaint is that the town of Canby maintained a pumping plant to supply its in-

*On applicability of Compensation Acts to states, counties, cities, districts, charitable and other public institutions, and their employees, see notes in L. R. A. 1917D, 143; L. R. A. 1918F, 190.

habitants with water; that in the plant there was a shaft which reached to within about a foot of the wall; and that on the shaft, beginning at the wall, there was first a pulley to receive an eight-inch belt, and then two inches from the pulley a fly-wheel was fastened to the shaft by a protruding key. On November 6, 1916, the municipality employed the plaintiff's son to operate the engine of the waterworks for the remainder of the year. It is claimed by the plaintiff that one of the terms of the employment of the son was that in his temporary absence at any time the plaintiff should be installed in his place; that the son was necessarily away about December 23, 1916, on account of which the plaintiff was in charge of the machinery, being employed by the son for that purpose on behalf of the defendant; that while endeavoring to put on the belt to start the machinery he was compelled to stoop over the pulley, and that in doing so his clothing caught on the key mentioned, whereby he was injured.

The answer denies the liability of the municipality, contending that the plaintiff was a trespasser and operated the machinery without authority; that he was well skilled as a machinist, and, on account of taking charge without any right to do so, he assumed the risk of the operation, and further, that the accident which he suffered was due entirely to his own carelessness. Lastly, it is said that the town was operating under what is known as the Workmen's Compensation Act (Laws 1913, p. 188), which, as it contends, exonerates it from liability in damages. This last defense was assailed by demurrer, which the court sustained. The other matter was put at issue by the reply, and a trial resulted in a judgment in favor of the plaintiff. The defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Hammond & Hammond* and *Mr. J. E. Hedges*, with oral arguments by *Mr. William Hammond* and *Mr. Hedges*.

For respondent there was a brief with oral arguments by *Mr. C. Schuebel* and *Mr. L. Stipp*.

BURNETT, J.—1. The demurrer to the defense based on the Workmen's Compensation Act was properly sustained, for as the law then stood, a municipality was not an employer within the meaning of the statute.

2. The principal question for our decision is whether or not there was any liability on the part of the town, inasmuch as there was no ordinance authorizing the employment of the plaintiff. The charter contains this provision:

"Canby is not bound by contract, or in any way liable thereon, unless the same is authorized by a city ordinance, and made in writing and signed by the mayor and recorder in behalf of the city; but an ordinance may authorize any officer or agent of the city naming him to bind the city without a contract in writing, for the payment of any sum not exceeding \$100."

It is not pretended that any ordinance was adopted by the council authorizing the employment of the plaintiff. Employment, indeed must rest in contract, and the contention of the defendant is that authority for making the contract of employment upon which the plaintiff relies must be traced directly or indirectly to some city ordinance. This would seem to be a plausible construction of the charter provision above quoted, but, in *Beers v. Dalles City*, 16 Or. 334 (18 Pac. 835), the court had under consideration a section of the charter of that municipality identical in language

with the one mentioned in the charter of the defendant. In an opinion by Mr. Justice STRAHAN in that case this language occurs:

“That section was designed to apply to those cases and only to those where an ordinance is required by the charter and where the work is expressly required to be let * * after notice, as in Section 86 of the charter.”

According to that case, under the doctrine of *stare decisis*, it was not necessary to have an ordinance to authorize making a contract with the plaintiff for his services as substitute for his son, who was the regular employee in charge of the pumping station.

3. The minutes of the council meeting contain only this about the employment of the son under date of November 6, 1916:

“Motion made that Kenneth Hornig be appointed to operate the engine of the waterworks for the remainder of the year, at \$16.00 per month. Carried.”

Supplementing this, the plaintiff introduced oral testimony of individuals present at the meeting, to the effect that it was agreed that young Hornig should be employed, and that he should procure the services of his father in his place when he was absent. This supplemental testimony, varying the journal record, was justified by *Stout v. Yamhill County*, 31 Or. 314 (51 Pac. 442), holding in effect that a party contracting with a County Court is not bound to see that the full terms of the contract are entered on the journal of the court.

4. There was enough testimony, therefore, on this point to take to the jury the question of whether or not the plaintiff was in the employ of the municipality at the time of the accident.

5. This being true, the way was open for the jury to find that the town was negligent in violation of the

Employer's Liability Act (Laws 1911, p. 16), in that it did not use every care and precaution which might have been used without impairing the efficiency of the plant, to prevent the plaintiff's clothing from catching upon the exposed key and causing his injury.

The assignments of error are centered about the proposition that the section of the charter referred to prevents the employment of the plaintiff unless the right to engage him can be derived mediately or immediately from an ordinance. The Beers case forecloses this contention, and the result is that the judgment must be affirmed.

AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued April 4, reversed and remanded June 17, petition for rehearing filed July 14, rehearing granted August 23, 1919, reargued *in banc* February 5, original opinion reaffirmed with modification March 30, 1920.

STATE v. MOSS.*

(182 Pac. 149; 188 Pac. 702.)

Larceny—Indictment—Variance.

1. Where plaintiff was indicted under Section 1950, L. O. L., denouncing the crime of larceny by stealing cattle, the indictment must be considered solely with reference to that offense, and a conviction cannot be sustained on proof that defendant, in violation of Section 1954, knowingly defaced brands on cattle.

Animals—Brands—Presumption of Ownership.

2. Under Laws of 1915, page 44, Section 8, declaring that the brand of any animal shall be *prima facie* evidence that the animal belongs to the owner of the brand, where there are two recorded brands upon the animal, the presumptions balance each other.

Larceny—Burden of Proof.

3. In a prosecution under Section 1950, L. O. L., for larceny of cattle, the state has the burden of proving that the cattle were property of individuals named as owners in the indictment, and that defendant took or asported the animals.

*On the question of brands as evidence of ownership of cattle, see note in 11 L. E. A. (N. S.) 87.

Larceny—Evidence.

4. In a prosecution under Section 1950, L. O. L., for the larceny of cattle, where it appeared that the animals defendant was charged with stealing were on open range, *held* that, though brands thereon had been obliterated, etc., and though defendant and his hired man were in proximity to the cattle which were with a larger number admittedly belonging to defendant, such facts did not show an asportation.

ON REHEARING.**Larceny—Finding of Defendant's Brand upon Animal Stolen Insufficient in Itself to Justify Conviction.**

5. The finding of one man's brand upon another man's cow is not alone sufficient to justify a conviction of larceny.

[As to brands on animals as evidence of ownership, see notes in 12 Ann. Cas. 414; 18 Ann. Cas. 544; Ann. Cas. 1913E, 133.]

Larceny—Evidence That Defendant's Brand is upon Stolen Cattle is Admissible.

6. In a prosecution for larceny of cattle, evidence that defendant's brand is found upon the animals alleged to have been stolen, with or without a disfiguration of the old brands, is admissible.

Criminal Law—What Deemed "Evidence to Support Verdict"—"Satisfactory Evidence."

7. The mere existence in a criminal case of any competent evidence, however conclusive, any circumstance, however remote, which a jury would have a right to consider if submitted along with other evidence, is not "evidence to support the verdict" within the constitutional provision, in view of Section 697, L. O. L., providing that evidence is deemed satisfactory which ordinarily produces moral certainty and conviction in an unprejudiced mind, and that such evidence alone will justify a verdict.

Larceny—Evidence Held Insufficient to Show That Defendant Placed His Brand upon Stolen Cattle.

8. In a prosecution for larceny of cattle, that about 300 of the stolen animals were found in one small valley on a public range used by defendant as a sheep range, that defendant's employee was seen in the vicinity, and that the cattle bore defendant's brand, was insufficient to connect defendant with the branding.

Criminal Law—Authority to Commit Crime not Inferred from Employment of Agent by Defendant.

9. Authority to commit a criminal act can never be inferred from the mere fact that the alleged agent was in the lawful employ of defendant.

Criminal Law—Admission of Ownership Held Insufficient to Show That Accused Disfigured Brands on Stolen Cattle.

10. In a prosecution for larceny of cattle which had been found carrying defendant's brand apparently superimposed upon an older brand, the mere fact that defendant said he thought some of the cattle were his was insufficient to connect him with the disfigurement of the brands.

Animals—Presumption Arising from Brands Stated.

11. Where two brands are found upon an animal, one older than the other, the presumption from the brands alone is that the ownership of the animal belongs to the older brand, and ordinarily under such conditions the burden is upon the owner of the later brand to establish his right to put such brand upon the animal.

Criminal Law—Cattlemen Could Testify as Experts as to Brands upon Animals Stolen.

12. In a prosecution for larceny, where defendant's brand had been found superimposed upon another brand on the animals stolen, it was not error to permit old cattlemen of long experience to testify as experts in relation of the growth of brands with the growth of the animal and the effect of a second burn on the old scar.

Criminal Law—Instruction as to Effect of Brands to Show Ownership Held Erroneous as Invading Province of Jury.

13. In a prosecution for larceny of cattle, an instruction that, if the company claiming to be owner of the stolen animals had "placed its brand on any of the animals, it is sufficient evidence" that the animals belonged to it, was erroneous as invading the province of the jury.

Larceny—Evidence as to Possession of Stolen Goods Admissible, Although not Recent or Exclusive.

14. In larceny cases the fact of possession of the stolen goods by defendant is admissible, notwithstanding such possession is not recent or exclusive, although such fact may not in itself be sufficient to raise a presumption of guilt.

From Lake: L. F. CONN, Judge.

Department 1.

The defendant was indicted for the larceny of two steers, seven cows and one calf, all branded and said to be owned by different parties, two of whom had a recorded brand. We condense the statement following from the brief for the state, supplemented by some of its testimony: The defendant himself was the owner of several hundred head of cattle which with the animals mentioned in the indictment and still others owned by other and different parties were ranging on a tract in the forest reserve, the pasturage of which had been allotted to the defendant. Those in dispute were collected by an inspector of brands and his assistants. Six heads of them were taken from a band of about

three hundred others of which it was estimated four fifths were the property of the defendant and the remainder belonged to other individuals without dispute. The other four were found at large in the same neighborhood.

There was evidence to the effect that most of the ten head mentioned in the indictment had on them mutilated brands of the alleged owners and the brand of the defendant as well. The cattle in question were taken by the inspector to Lakeview and kept there in custody of the sheriff pending the trial of the defendant. When the inspector went into the country where the cattle were feeding he met a man named Silvers, said to be the defendant's employee, about half a mile from the herd. There was testimony to the effect that Silvers had been sent there by the defendant to build a corral into which to put his calves during the weaning period and that the defendant himself had also gone there to instruct Silvers where to build the enclosure. Two witnesses testified to the effect that when the cattle had been brought to Lakeview the defendant was asked concerning them and said, "Some of them are mine." Respecting the range where the cattle in question were found, the following excerpt from the testimony of John Allen, a witness for the state, is here set down:

"Q. What is the nature of the country in general, between Sherman Valley and where they had these cattle?

"A. There is just cattle trails between the south fork and that, a kind of a rim, a rocky rim with trails—

"Q. Can cattle pass from one place to another?

"A. Yes, sir.

"Q. Was that in a little valley where they had them?

"A. Yes, sir; in between the two mountains.

"Q. Approximately how large is Sherman Valley, if you can give us an idea, how far across it? Just to give us a general idea.

"A. I should judge there is two or three hundred acres in Sherman Valley, what they call Sherman Valley meadow. * *

"Q. Do you know anything about whose range that is, whether it is under lease, or anything about that?

"A. Yes, sir.

"Q. Whose is it?

"A. Anybody's that runs cattle on the reserve.

"Q. Anybody that gets a permit can run cattle there?

"A. Yes, sir. * *

"Q. The cattle don't know who has a permit, do they?

"A. No, sir.

"Q. The range is not fenced in?

"A. No, sir.

"Q. Any of the cattle that are out on the public range, outside of the Forest Reserve, can get in there if they want to?

"A. Yes, sir.

"Q. Do you know whether it is the habit of cattle to follow other cattle in the hills, and congregate together?

"A. Yes, sir.

"Q. That is their habit?

"A. Yes, sir.

"Q. Do you know whether these cattle, at the time you saw them, were on the Forest Reserve, or off?

"A. On.

"Q. Know where the Forest Reserve lines are?

"A. Yes, sir.

"Q. The Forest Reserve line there runs almost directly north and south, doesn't it, the exterior line on the east side?

"A. Right down below, I think it does, it jogs on the way there, though.

"Q. It may jog on a section line, or something of that kind, but the general course is north and south?

"A. Yes, sir.

"Q. Off on east of that, what is it, the general country east, as to being open public range, or being fenced up?

"A. It is all open public range all through there.

"Q. Is there any obstruction of any kind to keep cattle from going right on to the Forest Reserve?

"A. No, sir; only around the meadows, is all.

"Q. Whenever a man has a small ranch or meadow fenced, that is the only fenced land?

"A. Yes.

"Q. And cattle turned loose on the public range can go right on the Forest Reserve if they wish to?

"A. Yes, sir.

"Q. What do you say as to whether there are good trails between the public range and the Forest Reserve, showing cattle travel them?

"A. There are trails all through there. * *

"Q. During the summer, prior to the time these cattle were found there, did you see cattle of other people besides those you have mentioned, on that range?

"A. Yes, I was up about twice this summer, or three times, that I went through, before that, and I run on quite a bunch of cattle before that. Saw cattle when I was up there, always do in the summer time.

"Q. It is not a range that is set aside for Mr. Moss?

"A. No, sir.

"Q. All of the people who run cattle in the neighborhood find cattle on the range in that locality right along?

"A. Yes, sir."

All the other witnesses for the state who spoke on that subject agree with Allen.

The only testimony in support of the allegation of ownership of any of the cattle as laid in the indictment is derived from brands and changes and obliterations of them. No witness testified who identified them except by brand, or imputed to the defendant any actual knowledge of the presence of the cattle on his range or

intimated that he was ever seen in their neighborhood, or ever applied any brand to them.

From a judgment on a verdict of guilty as charged, the defendant appealed. **REVERSED AND REMANDED.**

For appellant there was a brief over the names of *Mr. Herbert P. Welch* and *Messrs. McCamant, Bro-naugh & Thompson*, with an oral argument by *Mr. W. Lair Thompson*.

For the State there was a brief over the names of *Mr. George M. Brown*, Attorney General, *Mr. T. S. McKinney*, District Attorney, *Mr. C. H. Leonard* and *Mr. Lionel R. Webster*, with an oral argument by *Mr. Brown*.

BURNETT, J.—1, 2. There are numerous assignments of error, but we shall consider only one of them, that challenging the sufficiency of the evidence to sustain a conviction. The defendant was indicted under Section 1950, L. O. L., reading thus:

“If any person shall commit the crime of larceny by stealing any horse, gelding, mare, mule, ass, jenny or foal, bull, steer, cow, heifer, hog, dog or sheep, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years, or by imprisonment in the county jail not less than three months nor more than one year, or by fine of not less than \$50 nor more than \$1,000.”

There is another statute, Section 1954, L. O. L., which is here quoted:

“If any person shall willfully and knowingly make, alter or deface any artificial earmark or brand upon any horse, mare, gelding, foal, mule, ass, jenny, sheep, goat, swine, bull, cow, steer or heifer, the property of another, with intent thereby to convert the same to his

own use, such person shall be deemed guilty of larceny, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than five years."

As the indictment is drawn under the former section, it must be considered solely with reference to that standard, for, as taught in *State v. Howard*, 41 Or. 50 (69 Pac. 50), the two offenses are distinct and a conviction cannot be had under an indictment charging one offense when the evidence points exclusively to the other. There is no evidence in the record of any actual asportation of the property from the custody of the true owner. As stated, all the evidence of property rests upon the testimony concerning the presence of mutilated brands on the animals listed in the indictment. It is said in Section 8 of Chapter 33, Laws of 1915:

"In all suits at law or in equity, or in any criminal proceedings, when the title or right of possession is involved, the brand of any animal shall be *prima facie* evidence that the animal belongs to the owner or owners of the brand, and that such owner is entitled to the possession of the animal at the time of the action; *provided*, that such brand has been duly recorded as provided by law."

So far as this statute is concerned, without reference to the presumptions of innocence, regularity of private transactions and the like and confining ourselves to the mere presence of a brand upon an animal which is all the statute deals with, the same presumption must affect any brand coming within the purview of the enactment, viz., a recorded brand found upon the animals in question. The statute says nothing about age or priority of brands and in construing it or giving value to the *prima facie* presumption it creates, we cannot read into the law anything of that kind. Viewing the

matter, therefore, from the statutory standpoint, when we find two recorded brands upon a cow the presumptions arising from them balance each other and the state must produce something to disturb this equipoise adversely to the defendant, if it would prove the property to be that of another, or that the defendant stole it. The prosecution relies upon the testimony about discovering the cattle mentioned in the indictment in company with defendant's herd and still other cattle on the public domain where all cattle indiscriminately in that region could and did range. They were not in the actual custody of the defendant, neither is there any evidence tending to show that they ever were in his actual control. The question then is whether such testimony is sufficient to turn the scale against the defendant.

3. Much stress was laid also in argument upon the testimony about the mutilation and changes of brands upon the animals in question, the comparative ages of different brands on the same animals, the earmarks and dewlaps, and the like; but all this only goes to affect the question of property of someone in the cattle in dispute. The state had the burden of proving that the animals in question were the property of individuals named as owners in the indictment. Its task did not end there. It was compelled to go further and prove the other essential element, that the defendant took the cattle. We may safely say that there is testimony sufficient to go to the jury that the individuals named in the indictment owned the cattle described therein and that someone changed or effaced their brands and put on other brands and marks, but there is no evidence in the record that the defendant is that someone who made such changes either in person or by

an agent. This constitutes a hiatus in the case that is fatal to the prosecution.

4. It will not fill the gap to show that the defendant or his employee was in the vicinity where the cattle ranged. They both had a right to be there. In *State v. Odell*, 8 Or. 30, it was decided that proof that the prisoner was in the same town about the time of an alleged larceny in a store is not alone sufficient to corroborate the testimony of an accomplice or warrant a conviction, and it is the duty of the court so to instruct the jury. If such circumstances will not corroborate an accomplice who made a clean breast of his connection with and the participation of the defendant in the commission of the crime charged, by a parity of reasoning similar testimony adds nothing to the state's case against the present defendant. *State v. Odell*, 8 Or. 30, was approved in *State v. Townsend*, 19 Or 213 (23 Pac. 968), but was distinguished in the latter case on the ground that the defendant's presence near the scene of the crime was connected with suspicious circumstances, among which were that it was unusual for him to be in that vicinity; that he was there under an assumed name and that he was acting in concert with the other defendant, who avowed his own guilt. The *Odell* case was approved and followed in *State v. Scott*, 28 Or. 331 (42 Pac. 1), which teaches that mere opportunity to commit adultery is not sufficient to corroborate the woman who gave a detailed account of her adulterous liaison with the defendant when they were spending the day together in the woods where she affected to be hiding from her husband and the defendant was ostensibly fishing. Other parties saw them in the woods together and on the next day, according to the declarations of other witnesses, they went to Portland on the same train. Mr. Justice MOORE quotes

with approval this excerpt from 1 Roscoe's Cr. Ev., page 133:

"What appears to be required, is that there shall be some fact deposed to independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it."

The deduction is that the mere presence of the defendant or his hired man on the range where his cattle and those mentioned in the indictment were being pastured and where both of the men had a right to be, is not a circumstance sufficient to establish the asportation of the animals included in the charge, which were all the time ranging there.

Whether or not it is a happy expression to speak of balancing the statutory presumptions arising from the presence of two or more brands upon an animal, it refers only to the proof of ownership of the cattle. In the absence of any testimony competent to show that the defendant branded any of them or aided or abetted in such branding, it cannot affect the element of asportation so requisite to constitute larceny.

It is said in 17 B. C. L., page 73:

"The general rule that the possession of stolen property is evidence of guilt is limited by the rule that to warrant an inference of guilt it must further appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by the accused. It would be pushing the rule too far to require of one accused of a crime an explanation of his possession of the stolen property, when such possession could also, with equal right, be attributed to another. Hence the mere fact of finding stolen articles on the premises of a man of a family or in a place in which many others have free access without showing his actual conscious possession thereof discloses only a *prima facie* constructive possession and is not such a

possession as will justify an inference of guilt by reason thereof."

Similar language is found in Underhill on Criminal Evidence (2 ed.), Section 33.

The following excerpt is taken from *State v. Ford*, 175 N. C. 797, 801 (95 S. E. 154, 155):

"In *State v. Graves*, 72 N. C. 485, PEARSON, C. J., says that the presumption does not arise except when 'the fact of guilt must be self-evident from the bare fact of stolen goods, and HOKE, J., in *State v. Anderson*, 162 N. C. 571 (77 S. E. 238), that it is only when he could not reasonably have got possession unless he had stolen them himself.' The principle is usually applied to possession which involves custody about the person, but it is not necessarily so limited. 'It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence': *State v. Johnson*, 60 N. C. 237 (86 Am. Dec. 434)."

In *People v. Hurley*, 60 Cal. 74 (44 Am. Rep. 55), the syllabus reads thus:

"To justify the inference of guilt from the fact of possession of stolen property, it must appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by the accused."

In *State v. Drew*, 179 Mo. 315 (78 S. W. 594, 101 Am. St. Rep. 474), the defendant was charged with burglary and larceny in a store. Among other things stolen were some pieces of cloth, one of which was found in the defendant's residence locked up in a trunk the key of which was in the custody of his daughter. The court held that:

"The finding of recently stolen articles on the premises of a man of a family, without showing his actual, conscious possession thereof, discloses only a *prima*

facie constructive possession, and is not such a possession as will justify a presumption of guilt by reason thereof."

The same doctrine is taught in *State v. Warford*, 106 Mo. 55 (16 S. W. 886, 27 Am. St. Rep. 322); *Cooper v. State*, 29 Tex. App. 8 (13 S. W. 1011, 25 Am. St. Rep. 712); *Lehman v. State*, 18 Tex. App. 174 (51 Am. Rep. 298); *People v. Friedman*, 149 App. Div. 813 (134 N. Y. Supp. 153); *Ex parte La Page* (D. C.), 216 Fed. 256; *People v. Wilson*, 151 N. Y. 403 (45 N. E. 862).

In order to constitute larceny of the kind charged in the indictment there must be an asportation. The evidence was that all the cattle mentioned in the testimony were running at large on the public range or at least in places where cattle indiscriminately could and did go at will, and were so running at the time of the occurrence described by the witnesses. As stated, indeed, the testimony was to the effect that by far the greater part of the band where the cattle were found belonged to the defendant. One witness said about sixty were owned by another man and a few head in addition were the property of still other individuals. Under such conditions a felony is not to be imputed to the defendant respecting the animals in dispute on account of his owning the majority of the band. An inference might as well be drawn unfavorable to the owner of the sixty head. Under such circumstances, every animal is constructively in the possession of its owner and, as stated in *State v. Childers*, 71 Or. 340 (142 Pac. 333):

"Constructive possession cannot be in two people at the same time, whose interests are adverse to each other."

In short, there is nothing shown in the testimony that amounts to a disturbance of the constructive possession of whoever owned the cattle mentioned in the indictment. It is not shown that the defendant put his brand on the cattle or authorized it to be done. Although it is not necessary to the case, yet it is proper to state that he gave evidence of a disinterested witness to the effect that a branding iron of the defendant had been stolen from a ranch where the witness was employed and had been missed from there about a year prior to the discovery of the cattle in question. Unless there is some evidence tending to show that the defendant either branded the cattle himself or authorized it to be done as an aid to his larceny of them, the matter of finding his brand on the cattle must be laid out of the calculation in a case like the one before us. There is an utter absence of any testimony showing an asportation necessary to constitute the crime of larceny as charged in this indictment.

The court was in error in not directing a verdict for the defendant on his motion at the close of all the evidence in the case. It is unnecessary to consider the other assignments. The judgment of the circuit court is reversed and the cause remanded for further proceedings. It is possible that the prosecution may be able to make a better case at another trial, but a conviction cannot be sustained rightly on the record before us.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENNETT and HARRIS, JJ., concur.

Original opinion reversing the judgment reaffirmed with modification March 30, 1920.

ON REHEARING.

(188 Pac. 702.)

In Banc.

This case has already been once before the court (182 Pac. 149), and a reversal was then ordered, upon the ground that there was no sufficient evidence to support the verdict.

There was a petition for a rehearing, the district attorneys for the districts of eastern Oregon generally joining therein as friends of the court. The petition was granted, and we have again carefully considered the questions involved, as presented at the second hearing.

ORIGINAL OPINION REAFFIRMED WITH MODIFICATION.

Mr. George M. Brown, Attorney General, *Mr. C. H. Leonard*, *Mr. R. I. Kestor*, District Attorney, and *Mr. T. S. McKinney*, District Attorney, for the petition, with oral arguments by *Mr. Brown*, *Mr. Kestor* and *Mr. Leonard*.

Messrs. McCamant, Bronaugh & Thompson and *Mr. Herbert P. Welsh*, *contra*, with an oral argument by *Mr. W. Lair Thompson*.

BENNETT, J.—The contention on behalf of the state, as we understand it, is that the mere fact that one man's brand is found upon another man's animal, is of itself, sufficient to support a conviction of the larceny, without any evidence direct or circumstantial

as to who placed the brand upon the animal, or connecting the defendant with the branding in any way.

There was nothing presented at either hearing which would seem to us to justify adopting so extreme a doctrine or one so contrary to all the elementary principles of criminal law.

The statute in relation to brands has reference to lawful branding—not to unlawful. It makes the brand primary evidence of ownership. There is nothing in its terms to raise the presumption that an unlawful and larcenous brand was placed upon an animal by any particular person.

Any person who rides upon a range has it in his power to brand a stolen animal with the brand of a third person or with any brand he sees fit. All he needs to do so is a horse, a rope, and a running-iron, or a stamp brand, all of which are easy to manufacture or obtain.

It is a well-known fact that owners of large bands of stock do not and cannot, in the nature of the business, do all the branding themselves. Many of them do not ride at all, or do any branding at all, but leave this entirely to their subordinates, who go out upon the range and gather and brand anything which they may believe to belong to their employer. These employees are subject to constant change. Some are discharged with more or less frequency, and others employed in their place. Often they are here to-day and gone to-morrow.

Where a cattleman owns a considerable number, it is utterly impossible in most cases to trace or identify his cattle, except by brand. If the mere presence of his brand upon the wrong cow were alone enough to convict him of larceny, it would be easy for any dis-

satisfied or discharged employee or any unfriendly and vindictive neighbor to send him to the penitentiary; and this would be especially true if he happened to be a man who was generally disliked or distrusted in the community.

We fully realize the importance of the livestock business in the sections of the state where there is still a public range and the loss which such industry suffers each year from the depredations of stock thieves and cattle rustlers in such locations. The very nature of the business, where stock run upon the common range and are only identified by brands and earmarks, makes the commission of such crimes easy and their detection difficult and sometimes impossible. With the prosecution and conviction of the guilty in such cases we have the fullest sympathy.

5. But the law must have regard to the protection of the innocent as well as the punishment of the guilty. We know of no case in which it has been held that the finding of one man's brand upon another man's cow is alone sufficient to justify a conviction, and we are not willing to create such a precedent.

We are not willing to write a new doctrine, contrary to all the elementary principles of the criminal law, and which will always imperil the innocent, in order to sometimes reach the guilty.

6. We must not be understood as holding that the fact that one man's brand is found upon another's animal, with or without a disfiguration of the old brands, has no evidentiary value. Such a circumstance of itself arouses the gravest suspicion and is entitled to the careful consideration of a jury. When connected with other evidence, either direct or circumstantial, tending in a substantial way to prove that the

defendant either placed it there, or authorized or directed the act, it would be entirely sufficient to support a verdict. But there must be such evidence tending to show that the defendant did or authorized the branding, or else a link in the chain is broken and the whole case falls apart.

It seems to be assumed by the prosecution in this case that, if there is any competent evidence, however inconclusive—any circumstance, however remote—which a jury would have a right to consider, if submitted along with other evidence—that there is “evidence to support the verdict” under our constitutional provision and therefore the verdict must stand.

7. A little consideration will, we think, demonstrate that this cannot be a correct construction of the constitutional provision. Evidence that the crime in question has actually been committed (by someone) is always and necessarily competent and admissible, in a prosecution against any particular person—yet if the state stopped there and offered no evidence to connect the defendant with the crime, no one would contend (although there was some competent evidence before the jury) that a verdict of guilty could be sustained. It is not merely “evidence” which can invoke the constitutional provision but evidence “to support a verdict.”

This question was carefully considered by the court, in *Schneider v. Tapfer*, 92 Or. 520 (180 Pac. 107), in which it is said:

“We think, however, the constitutional provision did not intend to go further than to prohibit the court from re-weighing the evidence and revising the verdict of the jury in cases where there was conflicting evidence, or substantial evidence, to sustain the verdict. * * We hold that evidence merely suggesting a

suspicion or possibility, does not bring the case within the constitutional amendment, but that there must be substantial evidence upon which a reasonable man might reach a reasonable verdict."

And Mr. Justice HARRIS says in an opinion concurring in the result:

"I acquiesce * * in the announcement that a verdict cannot be permitted to stand, if the evidence offered in support of it does no more than to raise a suspicion."

In *Martina v. Oregon-Wash. R. & N. Co.*, 73 Or. 283 (144 Pac. 104), Mr. JUSTICE RAMSEY, long after this constitutional provision was adopted, said:

"In order that a verdict may be supported by the evidence, there must be some legal evidence tending to prove every material fact in issue."

Here one of the material facts was that the defendant, either by himself or another, did place the brand in question on the animals described in the indictment, since there was no other proof of any taking.

In this connection Section 697, L. O. L., which has never been changed or amended, is particularly pertinent to criminal cases. It provides:

"That evidence is deemed satisfactory, which ordinarily produce moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated insufficient evidence."

8. It is strongly urged that the circumstances under which the animals were found; the fact that so large a bunch of cattle (about 300) were found in one small valley; that they were upon a range used by the defendant as a sheep range; that the greater number of the cattle in the bunch belonged to the defendant;

that Silvers, the employee of defendant, was met in the vicinity coming from that direction, and that defendant had sent him up there to build a camp and wean the calves—connected the defendant with the branding. But it must be remembered that, according to the undisputed evidence of the state's own witnesses, the defendant had no exclusive cattle privilege on the range in question, but, on the contrary, it was open to everyone's cattle and was used in common by all.

If these animals had been found in defendant's immediate possession and control, as in his barn or sheds, or even, in some circumstances, in his field, a different question might arise, and there would, no doubt, be a presumption or inference that he was responsible for the disfigurement and rebranding. The case would then be analogous to the case offered on behalf of the state, as an illustration, where stolen property is found in the room occupied by a defendant. Here there was no such immediate possession or control.

If we assume (what was not proven but is probably true) that so large a number of cattle would not ordinarily be likely to congregate voluntarily in so small a place, then there might be a fair inference, from the facts of their being found there together with no one else in the vicinity, and that Silvers was met so near and coming from that direction, that he had gathered or rounded them up. This, however, would not of itself be anything unusual, nor would it show any exercise of ownership or possession of every animal in the bunch. It is a well-known fact in a cattle country, that it is impracticable, if not impossible, for a man who has a large number of cattle upon the range mixed with those of his neighbors, to separate them

one by one, as he finds them upon the range. It is the universal custom to round up everything, either for the purpose of inspection or separation, and then, when they are gathered in a bunch, they may be inspected, or the owner's cattle may be separated from the others, if that is the purpose of the round up.

In this case the undisputed evidence is, that the greater number of the cattle in this bunch bore the defendant's brands. But from one fifth to one fourth of them belonged to other neighbors, who had cattle upon this same range. No doubt the fact that the cattle were found gathered in one place, and with so many of defendant's cattle, was a circumstance to be considered by the jury, together with other evidence, if any had been offered, tending to connect the defendant with the re-branding; but it was not such an exclusive possession as would justify the presumption of theft by the defendant. If the cattle had been found with the brands freshly burned or their ears and dewlaps fresh and bleeding from the disfigurement, there might have been a just inference, from the circumstances, and the fact that Silvers was met coming from the immediate vicinity, that he was the party who had made the changes. But here, as we read the record, there was no claim that the disfigurement was immediately fresh. The evidence seems to show that the blotch designated as the "frying-pan brand" had been, probably, placed on the animal a few weeks before. One other brand was thought to have been made that season, and the remainder were old brands made one or two years before.

9. It must be remembered also, that even if Silvers had been proven to have done the rebranding, it would still have been necessary to connect the defendant with

the act, and show by direct or circumstantial evidence that he authorized or directed it, or in some way participated therein before he could be convicted of the crime. Authority to commit a criminal act can never be inferred from the mere fact that the alleged agent is in the lawful employ of the defendant.

In 16 C. J., page 123, Section 106, the law, in relation to this is epitomized as follows:

"The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. Therefore, the mere relation of principal and agent or of master and servant does not render the principal or master criminally liable for the acts of his agent or servant, although done in the course of his employment; it must be shown that they were directed or authorized by him. Moreover, a clear case must be shown."

The only other fact which is claimed to strengthen the case against the defendant is the fact that, when the cattle were gathered in the corral at Lakeview, he said, "Some of them are mine," and that on the witness-stand the defendant testified that he thought two of the animals, and possibly three, were his because his brand upon them seemed to him to be the oldest. He did not claim to know or identify the particular animals by their general description, and only claimed them upon the ground that his brand seemed to be the older.

One of these two, the frying-pan cow, was not proven in any way to belong to the persons charged in the indictment, and there was no evidence whatever that she had any other brand than the brand of the defendant, the points of which seemed to project below the blotch. The other one was a steer branded in defendant's brand above which was a comparatively

fresh brand designated as a "lazy 18." There was some evidence that there had been another brand under the "18," but no witness was able to speak with certainty as to what it had been. The nearest that any one came to identifying the brand underneath the "18" was the witness Hotchkiss, who testified:

"I don't know what else was under this 18; I think it was an 'FG,' but don't know whether it was or not."

And on cross-examination:

"Q. Could you distinguish any brand under that 18, or what were the indications to you that there was another brand there? Could you trace it out or what?"

"A. No, I don't believe I could."

All the other witnesses for the prosecution testified flatly that they could not tell what brand was underneath the "lazy 18," and all agreed that the defendant's brand was haired over and an older brand than the "18." The owner of the "18" brand (if there was any such brand in the neighborhood) was not called as a witness, and there was no evidence that there was no such brand thereabout.

10. We do not think that under the circumstances, the claim of the defendant that he thought some of these cattle were his, was sufficient evidence to connect him with any certainty with the disfigurement of the brands. There was no evidence that the defendant himself ever rode upon the range, or did the branding of his cattle himself, and the only evidence in that regard, is his own evidence that he did not. There is no evidence that he had ever been in the vicinity where the cattel were found, except his own statement that he was up there once, a few weeks before these cattle were taken off of the range. There is no evidence that he ever sold or disposed of any of them,

or attempted to do so. No evidence that he ever had them in his pastures in the fall or in his feed lots in the winter. There is no circumstance which even tends to show that he was present at the branding of any of these animals or authorized or directed it. There is nothing but the mere fact that the animals were found running with some of his cattle, together with other cattle, upon a range free to anyone who wished to use it, and that someone had placed a brand belonging to him thereon.

After very full and careful consideration, we can see no way by which we can lawfully and consistently avoid reaffirming the conclusion reached at the original hearing, that the chain of evidence offered by the prosecution has failed in an important link, and does not prove that the defendant was the person who did the branding in question. In short, while the evidence is ample to create and support a grave suspicion against the defendant, it does not point to him with the unerring finger of moral certainty, which will alone sustain a conviction in a criminal case. There is one expression, however, in the original opinion which, upon more careful consideration, we think should be modified.

11. Where there are two brands upon an animal, one older than the other, we think the natural presumption from the brands alone would be that the ownership of the animal belonged to the older brand, and that ordinarily under such conditions the burden would be upon the owner of the later brand to establish his right to put his brand upon the animal. The statute in relation to brands is silent as to this matter, and in our view it should be decided in accordance with the analogies of the common law. The first brand establishes ownership at one time and we think the presumption

of continuance should apply until a change of ownership or other evidence of ownership is shown. It is much like proof of ownership by possession. It is well settled that, where two parties depend upon possession as proof of ownership the older possession prevails over present or later possession.

In Lawson on Presumptive Evidence, page 492, the rule is laid down as follows:

“The possession of real or personal property raises a presumption of title.”

And in the same work at page 210, it is said:

“Where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be the owner until there is evidence that he has parted with that ownership.”

See, also, *Magee v. Scott*, 9 Cush. (Mass.), 148 (55 Am. Dec. 49), and *Davis v. Insurance Co.*, 36 N. Y. Supp. 792 (15 Misc. Rep. 263).

If this were not the rule in relation to branded animals, it would be very disturbing to the title to such property in the range country. There, as a rule, no man knows his animals except by the brand, and if a thief or wrongdoer could neutralize the evidence of the previous brand by putting on a fresh one, it would seldom be possible for the true owner to prove his ownership. If a large owner was occasionally selling some of his cattle, and someone should place a brand upon some of his range stock, he would be compelled to prove the negative that he had not sold the particular animal, which would generally be impossible. If a cattle owner should die, any evilly disposed person might put a fresh brand on half his bunch, and it would be impossible to prove that the deceased owner

had not, at some time, sold the animals. The purchaser, on the other hand, can generally easily prove the affirmative fact that he has purchased the stock in question, and, if necessary, he can always protect himself by taking a bill of sale.

The first brand upon range cattle, is almost invariably placed upon them when they are calves at their mother's side, and when the ownership can be easily ascertained. We think the better rule, and the one followed by cattlemen generally, is that there is a presumption in favor of the first brand. Of course, this is a disputable presumption and will yield readily to either direct or circumstantial evidence. As was said in the original opinion, the evidence was entirely sufficient to go to the jury as to the ownership of most of the cattle involved in this case.

We think the case should be sent back for a new trial in the event that the district attorney shall find himself able to strengthen his case. We will therefore proceed to notice the other claims of error which are likely to arise upon a new trial, and which are not sufficiently covered by what has already been said.

12. We do not think there was any error in permitting the witnesses for the state to testify as experts, in relation to the growth of brands with the growth of the animal, and the effect of a second burn upon the old scar. These witnesses were old cattlemen of long experience and the weight of their testimony was for the jury. There was no error in permitting Dick to testify as to the brands upon the other animals in the bunch where these were found.

We think there was no reversible error in giving the instruction in relation to the testimony of defendant. It might have been just as well if the court had

left out the word "only" from such instruction, but we think on the whole the charge was within the rule established by the decisions of this court: *State v. Clements*, 15 Or. 237 (14 Pac. 410); *State v. Bartlett*, 50 Or. 440 (93 Pac. 243, 126 Am. St. Rep. 751, 19 L. R. A. (N. S.) 802).

13. The court instructed the jury as follows:

"If you believe from the evidence and beyond a reasonable doubt, that the William Hanley Company is the owner of the brand 'LY' placed on the left hip of an animal, a record of which has been introduced in evidence, and that while it was so the owner of such brand, it placed the same on any of the animals mentioned in the indictment, then I charge you that it is *sufficient* evidence that the animal or animals so bearing said brand, is the property of said William Hanley Company, unless there is some other evidence to the contrary."

—and gave a like charge as to the cattle alleged to have been the property of the Eastern Oregon Live Stock Company. We are of the opinion that this instruction went too far and invaded the province of the jury.

The law in relation to brands to which we have already alluded, makes the brand of a stock owner *prima facie* evidence of his ownership, and such evidence is *sufficient to go to the jury*. But whether it is sufficient under all circumstances to *satisfy the jury beyond a reasonable doubt*, is a matter for it to decide. Nearly all of the animals in question here had two brands and as to some of them, at least, there was a controversy as to which was placed there first. Under these circumstances the court ought not to have told the jury that, if the Hanley Company "placed its brand on any of the animals, it is *sufficient* evidence" that the animals belonged to that company. The court

should have told the jury that such evidence was sufficient to justify a verdict in that regard, if, under all the circumstances, it satisfied them beyond a reasonable doubt of the ownership.

There was no error in refusing charge No. 6, which was entirely too broad.

The seventh instruction asked for by the defendant is elementary, and we see no reason why it should not have been given, although it may possibly have been sufficiently covered by the general charge.

14. The ninth instruction asked by the defendant was too broad and was properly refused, and the same is true of No. 10. These instructions are based upon the idea, that because an unrecent or unexclusive possession of stolen goods is not sufficient alone to justify a conviction, such facts cannot be considered by the jury at all. On the contrary, such facts are obviously circumstances which the jury had a right to consider, although they are not sufficient alone to raise a presumption of guilt.

The sixteenth instruction asked by the defendant was too broad and was properly refused.

ORIGINAL OPINION REAFFIRMED WITH MODIFICATION.

BENSON, J., took no part in the consideration of this case.

Submitted on briefs February 17, affirmed March 30, 1920.

CRANE v. SCHOOL DISTRICT No. 14.

(188 Pac. 712.)

Pleading—Complaint Held Sufficient as Against Motions to Strike and to Make More Definite.

1. In action against a school district to enforce payment on contract to furnish transportation to pupils under Section 4055, L. O. L., complaint, alleging that by a majority vote of the district's legal electors defendant was authorized to furnish transportation to certain pupils, pursuant to which authorization defendant contracted with plaintiff for the transportation, *held* not subject to motion to strike out or make more definite by setting forth the date of the alleged meeting of the electors, as plaintiff could not impart any knowledge in that respect which defendant did not have.

Pleading—Motion to Strike or Make Definite Waived by Pleading Over.

2. An objection to denial of motion to strike or to make the complaint more definite and certain is waived by pleading over.

Schools and School Districts—Complaint Held to State Cause of Action for Breach of Contract of Employment to Transport Pupils.

3. In action against a school district to enforce payment on contract to furnish transportation to pupils under Section 4055, L. O. L., complaint, alleging plaintiff was employed "to transport the pupils of defendant district * * for a term of nine school months beginning" on a certain date, stated a cause of action, although there was no specific averment that the employment was continuous from that date.

Evidence—Judicial Notice That Nine Months is School Year.

4. It is a matter of common knowledge that nine months constitute the current school year in Oregon, and that a longer or shorter period is an exception; schools generally throughout the state commencing on the second or third Monday of September and continuing for a period of nine months, known as the current school year.

Schools and School Districts—Findings in Action on Transportation Contract Warranted by Pleadings.

5. In action against a school district to enforce a payment on contract to furnish transportation to pupils under Section 4055, L. O. L., findings of fact that the contract was authorized by the legal voters and was executed as alleged in the complaint *held* warranted, although the complaint did not allege that such voters authorized the contract's execution for any specific length of time, for in the circumstances the current year of nine months would be a reasonable time, and must have been the period contemplated by the voters.

Contracts—Discharged by Destruction of Subject Matter.

6. Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse performance.

Contracts—Discharged by Impossibility of Performance by Act of Law.

7. One of the conditions implied in a contract is that the promisor shall not be compelled to perform if performance is rendered impossible by an act of law.

Pleading—Demurrer to Answer Its Truth.

8. Demurrer to an answer admits all the allegations thereof are true.

Schools and School Districts—Power of State Board of Health to “Quarantine” Does not Include Authority to Close Public Schools.

9. Neither the power of “general supervision of the interests of the health and life” of citizens, nor the power to make and enforce quarantine regulations, given by Section 4687, L. O. L., to the state board of health, embraces authority to close public schools, as to prevent spread of influenza epidemic, in view of Laws of 1913, Chapter 172, Section 1, subdivision 9.

Schools and School Districts—School Boards have Discretion to Close Schools on Account of Epidemic.

10. Under Laws of 1913, Chapter 172, Section 1, subdivision 9, providing that school boards shall have entire control of the public schools of their districts, the closing of the schools for any reason, as to prevent the spreading of influenza epidemic, rests in the sound discretion of the school board, and is therefore not a question of law.

Schools and School Districts—Answer in Suit on Transportation Contract Alleging Closing of Schools Held Insufficient.

11. In action against a school district to enforce payment on contract to furnish transportation to pupils under Section 4055, L. O. L. answer was insufficient on which to base defense of impossibility of contract's performance by operation of law, where it specifically alleged that the school sued was closed in obedience to the order of the health officer, and not otherwise; such officer having no such power.

Schools and School Districts—Contract to Transport Pupils not Necessarily Suspended by Closing School.

12. Closing of school would not necessarily suspend contract for transporting pupils during the school term, under Section 4055, L. O. L., where the contract contained no provisos or exceptions, and no order was made by anyone in any manner prohibiting the carrying out of its terms.

Contracts—Performance of Unqualified Contract not Excused by Impossibility Due to Unforeseen Contingency.

13. Generally, when one voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen it becomes impossible for him to do the act or thing he agreed to do.

From Tillamook: GEORGE R. BAGLEY, Judge.

In Banc.

The complaint alleges that prior to August 26, 1918, by a majority vote of its legal electors the defendant was authorized to furnish transportation to all of the pupils in the district living more than two miles distant from the school building, and:

“That on or about August 26, 1918, said school district, acting through its district school board, employed plaintiff to transport the pupils of defendant district to and from the school of said district for a term of nine school months, beginning on September 16, 1918, and agreed to pay plaintiff therefor at the rate of \$95 per school month, payable monthly.”

It is then alleged that plaintiff accepted and entered into the performance of the contract, but that the defendant, on or about October 14, 1918, closed its school and did not reopen it until about February 10, 1919, and:

“That during the time said school was so closed the plaintiff was at all times ready, able and willing to furnish the transportation provided for in said contract, and held himself in readiness at all of said time so to do; that the closing of said school during said period was not at the request or with the consent of plaintiff, nor with any agreement that his said contract of employment should be in any way modified.”

The plaintiff says that the defendant paid him \$95 for the first month's services, but has failed and refused to pay him anything for the four months beginning October 14, 1918; that about February 8, 1919, he presented an itemized account, but that the claim was considered about April 24, 1919, when the defend-

ant wrongfully disallowed it. He asks judgment for \$380.

The defendant filed a motion to strike out paragraph III of the complaint, first above quoted, "for the reason that the same is irrelevant, incompetent and immaterial." "And in case the court overrules the said motion to strike, the defendant moves that the complaint be made more definite and certain by setting forth therein the date on which was held the alleged meeting, which, it is alleged, authorized the school board of said district to furnish the transportation mentioned in paragraph II of the complaint." Both motions were denied. A demurrer to the complaint was then filed, "for the reason that the same does not allege facts sufficient to constitute a cause of action." This also was overruled. The defendant then answered, admitting:

"That on or about August 26, 1918, the plaintiff proposed to defendant and offered to transport the pupils of the defendant school district to and from school of said district during the school year of 1918 and 1919 for the sum of ninety-five (\$95) dollars per month, and the defendant accepted said offer and proposal under the conditions as hereinafter stated in the further and separate answer and not otherwise."

The closing of the school from October 14, 1918, to February 10, 1919, the payment of \$95 to the plaintiff for the first month's service by him, and the rejection of his claim of \$380 are also admitted.

As a further and separate answer the defendant alleges that about August 26, 1918, the plaintiff proposed and offered to transport pupils "to and from the school of said district during the school year of 1918-19, for the sum of \$95 per month, and the defendant accepted said offer and proposal." It is next

averred that the contract was entered into with the understanding that the school would open about September 16th, and would continue in session, in the usual and ordinary course, for the entire school year; and that it "would not be suspended or interrupted by extraordinary casualty, operation of law, orders or directions from authorities of the state or federal government, or other causes, over which neither party had control and for which neither party was responsible." It is averred that about October 1, 1918, there was a dangerous epidemic of influenza in the school district and in Tillamook County, which continued until about February 10, 1919;

"That on or about October 8, 1918, Rupert Blue, Surgeon General of The United States Public Health Service, acting by virtue of his office, and under the authority of law made and promulgated the following order, and directed the same to the State Health Officer of all the States of the United States of America, including the State of Oregon, in words and figures as follows:

"Public Health Service will mobilize with the aid of Volunteer Medical Service Corps all outside medical aid required in combating the present influenza epidemic. The American Red Cross upon specific request from this service will mobilize nursing personnel and furnish necessary emergency hospital supplies which cannot be obtained otherwise. Inform all city and county health officers in your State that all appeals for aid must be made to the State Board of Health which will make requests of the Surgeon General of the Public Health Service whenever local needs require. Whenever necessary Public Health Service will establish and distribute on medical and nursing service.

"RUPERT BLUE,

"Surgeon-General U. S. Public Health Service.

"That shortly after said date the Acting State Health Officer of the State of Oregon, acting in obe-

dience to said order and to the order of the State Board of Health of Oregon and by virtue of his office, and by authority of the laws of Oregon, issued and directed to Dr. R. T. Boals, County Health Officer of Tillamook County, Oregon the following order, to wit:

“ ‘Portland, October 8, 1918.

“ ‘Dr. R. T. Boals, County Health Officer,

“ ‘Tillamook, Oregon.

“ ‘Dear Doctor:

“ ‘By order of the Surgeon General of the United States Public Health Service, you are directed in case of the appearance of an outbreak of influenza in your community to discontinue all public meetings and close all schools and places of public amusement. Report immediately any cases occurring.’ ”

Then follows a copy of the above order of the surgeon-general. This letter is signed by Robert E. L. Holt, Acting State Health Officer.

The answer further alleges:

“That thereafter, on or about the 14th day of October, 1918, said Dr. R. T. Boals, as such County Health Officer, and by virtue of his office and by authority of law, ordered and directed the Superintendent of Schools and the directors of school districts, including defendant, to close and discontinue the schools of Tillamook County, Oregon, including defendant's said school, to be closed and suspended until further notice, and in obedience of said orders, and authority, and not otherwise, the school of the defendant school district were closed and wholly suspended from that date until on or about the 10th day of February, 1919. That during said time plaintiff did not and could not perform any service or duty under the contract, because there was no school to be attended, and no pupils to be transported to or from such school and thereby the subject matter of the agreement between the parties for the said period of suspension ceased to exist, and this without the fault of either of the parties in this action.

“That this period of suspension is the same period for which plaintiff claims compensation, and that at the expiration thereof, by permission of the authorities hereinbefore mentioned, the defendant resumed and reopened its said school, and thereupon plaintiff resumed his duties under said agreement, and is now performing duties and services thereunder.”

The plaintiff demurred to the further and separate answer, “for the reason that the same does not state facts sufficient to constitute a defense.” This was sustained by the court. The defendant refused to plead further. A jury was waived, and the court made findings of fact sustaining the allegations of the complaint, particularly paragraph III above quoted. Based thereon, judgment was rendered in favor of the plaintiff for \$380, and the defendant appeals, claiming that the court erred in overruling its motion to strike and the motion to make more definite and certain, in sustaining the demurrer to the further and separate answer, and in failing to permit the defendant to allege and prove the facts therein stated. **AFFIRMED.**

For appellant there was a brief submitted over the name of *Messrs. Johnson & Handley*.

For respondent there was a brief prepared and submitted by *Mr. H. T. Botts* and *Mr. T. H. Goyne*.

JOHNS, J.—This action is founded on a contract alleged to have been executed under Section 4055, L. O. L., which provides:

“That a district school board of any legally organized district shall, when authorized by a majority vote of the legal voters present at any legally called school meeting, furnish transportation to and from school to

all pupils living more than two miles from the school building.”

1, 2. There is no merit in the motion to strike out or make more definite paragraph II of the complaint. The defendant is the school district with which the alleged contract is made, and officially represents its legal voters. From necessity it would have full and complete knowledge of the holding of any meeting for that purpose, and the time when it was held. The plaintiff could not impart any knowledge which the defendant did not have and such objection was waived by pleading over.

3, 4. We also think that the complaint states a cause of action. It alleges that plaintiff was employed “to transport the pupils of defendant district to and from the school of said district for a term of nine school months beginning on the sixteenth day of September, 1918.” While there is no specific averment that the employment is continuous from that date, it is a matter of common knowledge that nine months constitute the current school year in this state and that a longer or shorter period is an exception. As a general rule, schools throughout the state commence on the second or third Monday of September and continue for a period of nine months, known as the current school year.

5. The case was tried without a jury, and the court made findings of fact that the contract was authorized by the legal voters, and was executed as alleged in the complaint. Although it is not alleged that the legal voters authorized its execution for any specific length of time, yet in the circumstances the current year of nine months would be a reasonable time, and must have been the period contemplated by the legal voters of the district.

6, 7. The defendant vigorously contends that its further and separate answer constitutes a good defense, upon the theory that:

“Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse performance.

“One of the conditions implied in a contract is that the promisor shall not be compelled to perform if performance is rendered impossible by an act of law.”

These legal principles are sustained by the authorities cited, and are the law.

The complaint is founded upon an express, unqualified contract. The defendant contends that through the order of the county health officer its public school was closed by operation of law, and that by reason thereof the contract was *ipso facto* suspended for a period of four months. Whatever may have been his power, there is nothing in the order of the surgeon-general of October 8, 1918, authorizing or directing that all public meetings should be discontinued, or that schools or places of public entertainment should be closed. Nothing is said about closing schools. There is no reference to them whatever.

8. The demurrer admits that all of the allegations of the further and separate answer are true; hence, we must assume that there was an epidemic of influenza in Tillamook County between October 1, 1918, and February 10, 1919; that Robert E. L. Holt, acting state health officer, issued to R. T. Boals, county health officer of Tillamook County, the following order:

“By order of the surgeon-general of the United States Public Health Service, you are directed in case of the appearance of an outbreak of influenza in your community to discontinue all public meetings and close

all schools and places of public amusement. Report immediately any cases occurring."

We must conclude that the school was closed and remained closed pursuant to that order.

Section 4686, L. O. L. provides for a "state board of health," to consist of seven members, and its powers must be found in the statute. Section 4687, which defines its duties, says:

"The state board of health shall have general supervision of the interests of the health and life of citizens of this state," and "it shall make and is hereby empowered to enforce such quarantine regulations as seem best for the preservation of the public health."

It is made the duty of officers of the state "to enforce such regulations." Section 4696 declares that:

"The board of health of each county shall be subordinate to the state board of health. * * It shall be the duty of the county boards of health to enforce all rules and regulations of the state board of health in their respective counties, which may be issued from time to time for the preservation of the public health and for the prevention of endemic, epidemic and contagious diseases."

9. It will thus be seen that it is the duty of the county board of health to "enforce all rules and regulations of the state board of health." The power to make and enforce quarantine regulations given the state board by Section 4687 does not embrace or carry with it the authority to close public schools. 7 Words and Phrases, page 5880, says:

"To 'quarantine' persons means to keep them, when suspected of having contracted or been exposed to an infectious disease, out of the community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community."

In operation it is confined to specific persons who have or who may have been exposed to a contagious disease, and it does not apply to the public in general. Although the state board is given "general supervision of the interests of the health and life of the citizens of the state," that provision should not be construed to mean that it alone has power to close the public schools of the state. Such authority would be very broad and far-reaching and would have to be read into the statute by construction. If it had been the intent of the legislature to confer such a vast power upon the state board of health, it should have used language far more specific and certain than that appearing in the sections quoted. In every school district in the state there are three or more directors, of more or less prominence, elected by the people, who are in close and active touch with conditions in their respective district, and who have general charge and supervision of the schools.

10. Subdivision 9 of Section 1, Chapter 172, Laws of 1913, provides that "boards shall have entire control of the public schools of their districts and the teachers employed therein." Subdivision 12 says that school boards may "on account of the prevalence of any contagious disease or to prevent the spread of any such contagious disease, prohibit the attendance of any teacher or scholar upon any school under their control." But this last does not empower school boards to close schools, and such authority, if any, must be found in subdivision 9. But that portion of the act does not say that in case of an epidemic of a contagious disease the school board shall close the school, nor does it point out or define as a matter of law when or for what specific reasons the board shall close the schools. Under its general powers of control and supervision,

the closing of the schools for any reason rests in the sound discretion of the school board, and therefore it is not a question of law. The legislature has rightfully assumed that in all such matters the school boards will work in harmony with the boards of health to prevent, suppress, control and regulate the existence and spread of contagious diseases.

11-13. It will be noted that in the instant case the defendant specifically alleges that the school was closed in obedience to the order of the health officer, and not otherwise, and hence it must follow that defendant's school was not closed by operation of law. Neither is it a sequence that the closing of the school would suspend the contract between plaintiff and defendant, which by its terms was confined only to the transporting of pupils to and from school. The contract does not contain any provisos or exceptions, and no order was made by anyone which would in any manner prohibit the carrying out of its terms. As stated in 3 Elliott on Contracts, Section 1891:

"The general doctrine that, when a party voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen it becomes impossible for him to do the act or thing he agreed to do, is well settled. As a man consents to bind himself so shall he be bound. Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement, it is a general rule of construction, founded on the absolute and unqualified term of the promise, that the promisor remains responsible for damages, notwithstanding the supervening impossibility or hardship."

The judgment is affirmed.

AFFIRMED.

Argued January 22, reversed and remanded March 2, rehearing denied April 6, 1920.

REED v. HOLLISTER.

(188 Pac. 170.)

Trusts—No Cause of Action Against Trustee for Refusal to Deliver Funds Until Demand for Accounting.

1. Where defendant had been intrusted with funds by plaintiff's intestate for purpose of investment, and refused to deliver up the money, or deliver up possession of the securities purchased therewith, no cause of action arose against defendant until a demand for an accounting and settlement had been made.

Executors and Administrators—Foreign Administrator may Sue in Individual Capacity on Foreign Judgment Obtained by Him in Spite of Statute.

2. Judgment recovered in another state by administrator for defendant's refusal to deliver intestate's funds invested in capacity of trustee, or deliver securities purchased, could be made the basis of a cause of action, notwithstanding Section 761, L. O. L., limiting administrator's authority to jurisdiction of government under which he was invested with his authority, since such action can be brought by administrator in its individual capacity, both original cause of action and cause of action to enforce judgment having accrued subsequent to intestate's death.

Judgment—Of Other State Conclusive in Action to Enforce it.

3. Judgment of court of general jurisdiction of other state having jurisdiction over defendant's person either by regular service of process or voluntary appearance, in a proceeding so stated in the pleadings as to call for the exercise of the court's jurisdiction if pertinent to the issues raised by such pleadings, is final and conclusive when pleaded as a ground of action in this state.

Judgment—Of Other State may not be Attacked in Action Thereon For Errors at Trial.

4. Though defendant, when sued on the judgment of a sister state, may challenge the jurisdiction of the court, of the subject matter, and of his person, and complain that the judgment was not one authorized by the pleadings, yet, under constitutional provision requiring full faith and credit to be given to the judgment of a sister state, cannot be attacked because of mere errors committed by the court during the trial of the case.

From Coos: JOHN S. COKE, Judge.

Department 1.

This is an action to recover from the defendant upon a judgment which the plaintiff says he obtained in a court of the State of California. The complaint in this action here follows:

"The plaintiff complains of defendant and for cause of action alleges:

"That at all times hereinafter mentioned, the Superior Court of the State of California, in and for the County of San Diego, was a court of general jurisdiction, duly created and organized under the laws of that state.

"That on the 20th day of July, 1915, the plaintiff commenced an action in said court against the defendant Frederick Hollister by the issuance of a summons, which summons was duly and personally served upon said defendant, and in which action the defendant appeared in person, and by Joseph S. Campbell, Esq., his attorney.

"That thereupon such proceedings were had therein in said court, that on the 9th day of January, 1917, the said cause was tried before the court, without a jury, and said Frederick Hollister, defendant herein, appearing personally therein, and that on the 19th day of January, 1917, a judgment in the sum of thirty thousand five hundred and eighty-three and 33-100 (\$30,583.33) dollars was duly given and made by said court in favor of the plaintiff and against the defendant.

"That said judgment has not been paid nor any part thereof, and that the whole thereof remains due and payable from the defendant to the plaintiff.

"Wherefore, the plaintiff prays judgment against the defendant herein for the said sum of thirty thousand five hundred eighty-three and 33-100 (\$30,583.33) dollars, together with interest thereon from the 19th day of January, 1917, and for costs in this suit expended."

In the answer the defendant does not in any wise deny the complaint, but sets forth a copy of the complaint in the California action as follows:

“In the Superior Court of the State of California, in
and for the County of San Diego.

“No. —

“Edwin Reed, Administrator of the Estate of Frances
S. Furry, Deceased,

“Plaintiff,

vs.

“Frederick Hollister,

“Defendant.

“AMENDED COMPLAINT.

“The plaintiff complains of the defendant and for
his cause of action alleges as follows:

“That the plaintiff was, on the 13th day of July,
1915, duly appointed administrator for the estate of
Frances S. Furry, deceased; that he has duly qualified
as such administrator and ever since the same day, and
has been and now is the administrator of said estate.

“That Frances S. Furry died on the 25th day of
March, 1914, in the city of San Diego, State of Cali-
fornia.

“That some time subsequent to November, 1912, and
before her death, the said Frances Furry delivered to
the defendant Frederick Hollister, the sum of \$32,-
000.00 with instructions to invest the same for her in
first mortgages and other good and sufficient securities
in the state of Oregon, and elsewhere.

“That the said Frederick Hollister did invest the
said sum of \$32,000.00 in mortgages and other secu-
rities, a complete list thereof being delivered to the
said Frances Furry, but that a careful search of the
papers of the deceased fails to disclose the said list so
that plaintiff is unable to give full and complete list
of said securities and mortgages.

“That said defendant invested said money and pur-
chased said mortgages for and on behalf of the said
Frances S. Furry; that she received no evidence of the
indebtedness or property, and that he retained the pos-
session of the said evidence of indebtedness and prop-
erty and has at all times herein mentioned and now

still retains the possession thereof, notwithstanding that demand has been made therefor.

"That the said defendant paid to said Frances S. Furry during her lifetime the interest and income derived from said securities and at the time of her death the said Frances S. Furry was entitled to possession of said securities and property and said defendant held the same for and on her account subject to her order; that defendant has no right, interest, or lien against said securities and property.

"That since the death of said Frances S. Furry, the said defendant has retained the possession of the said evidence of indebtedness and property, and has converted a part thereof into money, and that he still withholds said evidence of indebtedness and property, and the money derived therefrom and refuses and declines to account for and to transfer said securities and money to plaintiff.

"That the plaintiff has demanded of the defendant that he account to the estate of Frances S. Furry for all money or moneys received by him, to transfer all securities held by him that are part of the estate of Frances S. Furry, deceased, and that he pay to the plaintiff such sum or sums as may be found by such accounting to be due to the said estate by reason of the transactions hereinbefore set forth, but that he has declined, refused and neglected to do so.

"Wherefore plaintiff prays:

"1. That the defendant, Frederick Hollister, be ordered to file an account of all transactions had with reference to the investment and re-investment of the said \$32,000.00.

"2. That the said Frederick Hollister be required to account to the plaintiff as administrator of the estate of Frances S. Furry, for such a sum or sums as may be due said estate by reason of said transaction.

"That the said Frederick Hollister be required to set over to and transfer to the estate of Frances S. Furry, any and all mortgages and other forms of indebtedness which were purchased from the moneys entrusted to him by said Frances S. Furry, for the

purchase of investments, and such and further relief as to this court may seem just and equitable.”

Also, in the answer in the instant cause appears the answer in the California action, concerning which it is enough to say that after admitting that the plaintiff was appointed administrator of the estate of Frances S. Furry, deceased, and that she died as stated in the complaint there, it denies all the allegations of the complaint there. In other words, there was a plea of the general issue only, without affirmative matter.

After setting forth these pleadings, and stating that there was no reply filed in the California case, the answer here goes on to set out the statements made by the respective council in opening the case at the trial, besides sundry dialogues between the court and council, and states that the wills of William Henry Hollister, of the City of New York, and of Philoclea A. Hollister, a resident of the State of Oregon, were introduced in evidence, all of which is followed by the findings of fact and conclusions of law entered in the California case, and the recital that judgment “was entered as alleged for \$30,583.33 with costs.” The answer also pleads certain statutes of the State of New York relating to the execution of powers; that on February 5, 1917, George Stanton Hollister, one of the children of Philoclea A. Hollister, commenced a suit against the present defendant in Coos County, Oregon, to construe the wills of William Henry Hollister and Philoclea A. Hollister, which resulted in a decree to the effect that the residuary clause of the latter will operated to execute a power vested in that testatrix by the former will, whereby this defendant was entitled to receive a trust fund of \$40,000 mentioned in the William Henry Hollister will, on account

of all of which the defendant contends that the plaintiff should be estopped from claiming that there is anything due from the defendant to the plaintiff. The defendant also states that during all the time mentioned herein he was a citizen of Oregon, residing and domiciled at North Bend, in Coos County, Oregon.

Afterwards, without further pleading, so far as the abstract discloses, each party moved for judgment in his favor according to the prayer of his pleading. The court passed judgment for the defendant to the effect that he recover from the plaintiff his costs, taxed at \$5, and that the plaintiff take nothing. The plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Williams & Bean*, *Mr. Vernon M. Parsons* and *Messrs. Henning & McGee*, with oral arguments by *Mr. John M. Williams* and *Mr. Parsons*.

For respondent there was a brief over the names of *Mr. A. S. Hammond*, *Mr. C. J. McKnight* and *Mr. J. D. Goss*, with oral arguments by *Mr. Hammond* and *Mr. McKnight*.

BURNETT, J.—Relating to judgments of the courts of a sister state, Section 761, L. O. L., reads as follows:

“The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action, suit or proceeding, and except also that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.”

On superficial observation it would seem from the title of the cause that the plaintiff is seeking to exercise authority in this state as an administrator, with the possible inference that he was appointed as such by a court of some other state. Except as indicated in the title of the cause, the complaint in the Oregon court says nothing whatever about plaintiff's being possessed of any representative character. The California complaint merely narrates that he was the duly appointed administrator of the estate of Francis S. Furry, and that he is now such an officer, duly qualified, but does not state the source of his appointment. However that may be, and wherever he may have been appointed, it is not decisive of the case, nor does it bring the issue within the exception limiting the authority of an administrator under Section 761, L. O. L. In *Burrell v. Kern*, 34 Or. 501 (56 Pac. 809), in an opinion by Mr. Chief Justice WOLVERTON it was held that executors may sue either individually or in their representative capacity, at their option, on causes of action, either in contract or in tort, accruing after the death of the intestate or testator, and that in such cases complaint need not show for whose estate they are executors. That was a suit to foreclose a mortgage, in which the plaintiffs styled themselves in the title of the cause: "Walter F. Burrell and D. P. Thompson, Executors." They further alleged in the body of the complaint that they were the duly appointed, qualified and acting executors of the will of M. S. Burrell, deceased. They charged that the defendants executed a note to "W. F. Burrell and D. P. Thompson, Executors," which was secured by the mortgage of the defendants. Failing in their effort to have the complaint made more definite and certain, so as to show the name of the deceased for whom the plaintiffs

acted as executors, in taking the note in the form noted, the defendants demurred on the same ground, claiming that the complaint did not state facts sufficient to constitute a cause of suit. In the course of his discussion of the matter Mr. Chief Justice WOLVERTON said:

"The prevailing rule seems to be, with possibly some few exceptions, that when the cause of suit or action, whether in contract or in tort, accrues after the death of the testator or intestate, the money, if recovered, will be assets of the estate, and the executor or administrator may sue, at his option, in either his representative or individual capacity. * * The use of the word 'executors' in the title of the cause and in the note is a mere *descriptio personae*, and does not of itself operate to attach to plaintiffs a representative character, * * and may be regarded as surplusage. * * As the note and mortgage in question were made, executed and delivered to the plaintiffs, and not to their testator, they were authorized, under the rule, to sue in either their representative or individual capacity; and it is very apparent that the complaint states a good cause of suit in one or the other capacity, and is amply sufficient as against the test of a general demurrer."

Like doctrine was announced in *Kitchen v. Holmes*, 42 Or. 252 (70 Pac. 830), where the plaintiff was permitted to recover in her individual capacity on a note given to herself as administratrix. Later, in *Sears v. Daly*, 43 Or. 346 (73 Pac. 5), the same principle was laid down allowing an executor to recover either as an individual or in his representative capacity, at his election, upon a note given to him after the death of his decedent.

In the instant case the plaintiff appears in court to enforce a cause of action upon the judgment of a sister state, which cause of action accrued to him after the death of his decedent. Going further back into the

California complaint, we find the substance of it to be that the defendant here was intrusted by the decedent with her money, to be invested and managed by him in the capacity of a trustee.

1. Manifestly, no cause of suit or action against him could arise until a demand for an accounting and settlement. This demand was not made, according to the narration in the California case, until after the death of Frances S. Furry. Hence the cause of action accrued not in her favor, but on behalf of her personal representative.

2. Thus, whether we consider it in its original form or in its changed state as embodied in the California judgment, the cause of action accrued after the death of the decedent, so that, under the authority of *Burrell v. Kern* and other precedents, the plaintiff may sue either in his original capacity or as the personal representative of the decedent. Payment to Reed in Oregon either as an individual or as administrator should discharge that judgment. If he recovers as an individual in this action, he is bound to account to the decedent's estate for the proceeds of the judgment rendered here. We conclude, then, that the plaintiff may be considered as prosecuting this action in his individual capacity, and is not restricted by the exception in Section 761, L. O. L.

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof": Article IV, Section 1, United States Constitution.

3. It is a principle well grounded in precedent that, given a court of general jurisdiction under the laws of a sister state, having authority over the person of a

defendant either by regular service of its process upon him or by his voluntary appearance and submission to the jurisdiction, and a suit, action or proceeding so stated in the pleadings as to call for the exercise of the court's jurisdiction, its judgment rendered in pursuance of and consonant with, that invocation of its authority is final and conclusive when pleaded as a ground of action in another state. This is the doctrine laid down in *De Vall v. De Vall*, 57 Or. 128 (109 Pac. 755, 110 Pac. 705), in an opinion by Mr. Justice MOORE. The complaint in the instant action is confessed *in toto*. We have, then, two of the necessary conditions admitted, viz.: That there was a court of general jurisdiction of a sister state, that the defendant was served with process, and that he appeared in person in the action in the California court. In other words, it is conceded that the California court had the right to entertain and determine the kind of a case there involved, thus establishing jurisdiction over the subject matter. Further, the defendant admits that he was served with the process of that court, and afterwards appeared there and personally participated in the trial of that action which resulted in the judgment of that court. Jurisdiction of the person of the defendant in that litigation is thus apparent.

The effort of the defendant here seems to be an attack, not upon the assumption of jurisdiction by the California court in the first instance, but upon its subsequent exercise of that authority. In substance, as stated, the suit in California was for an accounting of moneys said to be held by the defendant in trust for the decedent, Frances S. Furry, upon which the general issue was joined. In effect, the prayer of the complaint there was that the defendant be required to account to the plaintiff for such sum or sums as might be due

the estate by reason of the transactions between the defendant and the decedent, and for such further relief as the court might therein deem to be equitable. In other words, the endeavor was to get from the defendant the property of the decedent, in whatever form it had to be taken under his administration. A decree for the direct payment of money was germane to the issues there joined upon the pleadings. It is a matter of frequent occurrence that suits for an accounting are concluded by a decree in favor of the plaintiff for a certain sum of money. We have, therefore, in the instant case a complaint properly calling for the exercise of the authority of the court of a sister state and a judgment in form consonant with that request.

4. It is indeed true, that when an action is brought in this state upon the judgment of a sister state, the defendant is permitted to challenge the jurisdiction of the court, not only of the subject matter, but over his person, and to complain that the judgment was not one authorized by the pleadings. Thus far, the attack may proceed, but no farther, else we would violate the constitutional injunction to give full faith and credit to the judgment of a sister state. For instance, A. institutes an action against B. in a court of general jurisdiction in a sister state, claiming judgment for money due upon a promissory note. Although B. might appear and contest the action, yet, if the court should render judgment requiring him to convey a tract of land to A., it would not preclude the defendant from resisting an action on such a judgment in Oregon. The reason is that the court there had no authority to render such a judgment. It was not within the scope of the plaintiff's demand for the exercise of the judicial function. On the other hand, we are not concerned with possible errors committed

by the court during the trial of the cause, as upon the admission or the construction of writings offered in evidence, or instructions to the jury, or anything of that kind. The opposition to the collection of a judgment of a sister state by an action in this state cannot be carried to the extent of constituting our courts appellate tribunals to correct the possible errors of the California court. No appeal lies from the courts of that state to the courts of Oregon. When the final judgment was rendered there it became final everywhere. It meets the threefold test of: (1) jurisdiction over the subject matter or right to hear and determine the kind of case involved; (2) jurisdiction over the defendant's person by service of process upon him and his actual personal appearance and participation in the trial of the action; and (3) a judgment pertinent to the issues made by the pleadings in the California litigation. If errors were committed in the trial there, the defendant must find his remedy in his appeal to the courts of that state. We cannot give them attention. The result is that the judgment of the Circuit Court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and JOHNS, JJ., concur.

Argued February 4, reversed and remanded March 9, rehearing denied April 6, 1920.

**HOLLAND-WASHINGTON MORTGAGE CO. v.
COUNTY COURT OF HOOD RIVER COUNTY.**

(188 Pac. 199.)

Certiorari—Where Writ of Review was Quashed for Lack of Jurisdiction, Merits cannot be Considered on Appeal.

1. Where the only ruling made by the court below on a petition for writ of review was to quash and dismiss the writ on the ground of lack of jurisdiction to hear it, the merits of the case cannot be considered on appeal.

Certiorari—Court has Discretion to Enlarge Time for Service of Copy of Writ.

2. On petition for a writ of review to be directed to the County Court the circuit judge has authority to extend the time beyond the original return day in which return might be made and service of copy of writ be had upon respondent under Section 609, L. O. L., in view of Section 604, authorizing the Circuit Court or judge thereof to order the writ, Section 608, providing that the writ may be returnable either in term time or in vacation, Section 958, empowering the judge to exercise out of court the powers especially conferred on a judge as contradistinguished from the court, Section 983, giving a court or judicial officer all necessary means to carry into effect jurisdiction conferred, and Section 103, providing that the court may in its discretion allow an act to be done after the time limited by the Code.

Courts—Property of Nonresidents is Subject to Jurisdiction of Court Relative to Establishment of Roads Advantageous to Owner.

3. The landed estates of nonresidents being subject to the police power of the state both for favorable and unfavorable action, such property is subject to the jurisdiction of the state courts relative to the establishment of a road of public easement for the benefit thereof.

Certiorari—Service may be by Delivery of Copy of Writ to Nonresident Personally.

4. It is competent for the legislature to provide that service of a writ of review shall be by delivering to a nonresident personally a copy of the writ.

Private Roads—Neither County Court nor Members Thereof Proper Parties to Writ of Review Directed to County Court.

5. In a petition for a writ of review to be directed to the County Court relative to the establishment of a road of public easement for the benefit of privately owned land, neither the County Court as a judicial tribunal nor the individuals who as officers compose such court were proper parties.

**Certiorari—Order for Writ Need not Prescribe Manner of Service
“According to the Direction Thereof.”**

6. An order for the issuance of a writ of review need not prescribe the manner in which it is to be served nor need the order recite the statute, because serving the writ “according to the direction thereof” as indicated by Section 609, L. O. L., means to serve the writ upon the parties to whom the process is directed.

Certiorari—Petition Need not be Filed Before Order for Issuance.

7. A petition for a writ of review need not be filed before an order for the issuance of the writ is made.

**Private Roads—County is Made Defendant by Operation of Law
in Petition for Writ of Review Relative to Establishment of
Private Road.**

8. A petition for a writ of review to be directed to County Court in a proceeding relative to the establishment of a road of public easement for the benefit of adjoining lands need not expressly make the county a party, since the county is a defendant by operation of law, being responsible for acts occurring upon road under Section 6375, L. O. L.

**Certiorari—Writ of Review may be Served upon County by Delivery
to Clerk.**

9. A writ of review may be served upon the county by delivering the writ to the county clerk; the service being analogous to that of a summons under Section 55, L. O. L.

**Certiorari—County Clerk may Admit Service of Writ of Review
for County.**

10. A county clerk upon whom a writ of review is served as a process against the county may admit service thereof in his official character which is binding upon the county.

From Hood River: FRED W. WILSON, Judge.

Department 1.

On August 31, 1918, the plaintiff presented a petition for a writ of review to the judge of the Circuit Court for Hood River County and obtained from him an order directing the writ to issue to the County Court of that county and Humphrey Barton, defendants, and to Kent Shoemaker, county clerk of Hood River County, in substance commanding a return of the writ into the Circuit Court on November 15, 1918, together with a certified copy of the proceedings of the County Court relating to the establishment of what is familiarly known as a road of public easement for the bene-

fit of the land of Barton. On the return day, November 15, 1918, the judge made an additional order in these words:

"Now, on this day, upon application of the plaintiff, it is ordered that the time for returning the writ of review in the above-entitled cause and the time for service thereof upon the defendant Humphrey Barton be, and the same is hereby, extended and continued until the 14th day of December, 1918."

On October 25, 1918, the writ was returned with certified copies of all the proceedings of the County Court attached thereto, having indorsed on the writ also the following admissions:

"State of Oregon, County of Hood River,—ss.

"I, Kent Shoemaker, clerk of Hood River County, State of Oregon, and Clerk of the County Court of the State of Oregon, for Hood River County, hereby acknowledge service of the within and foregoing Writ of Review upon me at Hood River, in Hood River County, Oregon, this 4th day of September, 1918.

"(Seal)

KENT SHOEMAKER, Clerk.

"By E. E. SHOEMAKER, Dep.

"State of Oregon, County of Hood River,—ss.

"I hereby acknowledge service of the within and foregoing writ upon Hood River County by delivery to me of a copy of said Writ as Clerk of said County at Hood River, in Hood River County, Oregon, on the 4th day of September, 1918.

"(Seal)

KENT SHOEMAKER,

"Clerk Hood River County, Oregon.

"By E. E. SHOEMAKER, Dep."

On November 15th and as the abstract states, after the judge had made the order of that date extending the time for service of the writ upon Barton, the latter by his attorney, stating that he appeared specially for the purpose of the motion only, moved the court "for

an order dismissing the plaintiff's petition herein, the writ of review, return thereof, and all of the proceedings in this court," upon the following grounds:

"That the court has no jurisdiction of this defendant nor any jurisdiction to review any order, decision, proceeding, or thing, for the reason that the defendant has not been served by the delivery to him of a certified copy, or any copy, of the Writ of Review, nor has there been and for the reason that there has not been any service of any kind upon the defendant.

"That the members of the County Court of Hood River County, Oregon, were not and are not parties to this proceeding, and they or any of them have not been served with a certified or any copy, of said writ or at all, and this Court has no jurisdiction of the said County Court, or any of the members thereof.

"That it was not and is not directed in or by said order herein made and dated on August 31, 1918, allowing said writ of review, nor in or by said writ of review, or otherwise, how, when, where, or to whom the original writ should be delivered, or served, or served by delivery, nor does the record reveal, and it is not true, that said writ was ever 'served by delivering the original, according to the direction thereof,' and this Court has acquired no jurisdiction to review said matters.

"This Court had no jurisdiction to make the Order herein dated August 31, 1918, allowing a writ of review and directing that such should issue out of this Court, for the reason that there was no petition on file in this Court at the time for such order; that plaintiff made no attempt to file any petition herein until September 3, 1918; that no petition of any kind was filed herein by plaintiff prior to September 3, 1918.

"The petition of plaintiff for a writ of review does not state facts sufficient to show that plaintiff is entitled to a writ of review or to any relief from this Court, and this Court has no jurisdiction to review any order, decision, proceeding or thing."

On December 3, 1918, there was filed in the Circuit Court an affidavit which, after giving the title of the court and cause, reads thus:

“State of Minnesota, County of Ramsey,—ss.

“I, Peter Wagener, being first duly sworn, depose and say: That I am a citizen of the United States, and of the State of Minnesota, and am over twenty-one years of age, and am not interested directly or indirectly in the above entitled cause. That on the 25th day of November, 1918, at St. Paul, in the State of Minnesota, I served upon Humphrey Barton, one of the defendants above named, a copy of the Writ of Review in the above-entitled cause, and an order of the Court of November 15th, 1918, both certified by Kent Shoemaker, County Clerk of the County of Hood River, State of Oregon by then and there delivering to said Humphrey Barton personally and in person the said copies of said Writ of Review and Order of the Court above mentioned, duplicates of which are attached to this return and made a part thereof.

“PETER WAGENER.”

This affidavit was subscribed and sworn to before a notary public for Minnesota, November 25, 1918. The motion to quash the writ, etc., was heard February 20, 1919, and sustained, whereupon the court ordered:

“That the writ of review and the return made thereon in this proceeding and all of the proceedings in this court upon said writ of review be and the same are hereby, quashed and dismissed for lack of jurisdiction to hear the same in this court.”

The petitioner for the writ appealed.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. R. W. Montague* and *Mr. W. H. Wilson*, with an oral argument by *Mr. Montague*.

For respondents there was a brief submitted over the name of *Mr. Ernest C. Smith*.

BURNETT, J.—1. On the authority of *Holmes v. Cole*, 51 Or. 483 (94 Pac. 964), the only question for us to consider is the ruling of the court quashing and dismissing the writ; and we cannot consider the merits of the objections to the transactions in the County Court.

Respecting the writ of review it is required that—

“The writ shall be served by delivering the original, according to the direction thereof, and may be served by any officer or person authorized to serve a summons; and a certified copy of the writ shall be served by delivery to the opposite party in the suit or proceeding sought to be reviewed, at least ten days before the return of the original writ”: L. O. L., § 609.

At the outset it is contended by the defendant Barton in argument upon his special appearance that the court had no right to extend the time beyond the original return day in which the return might be made and service of a copy of the writ be had upon him. The writ itself may be ordered by the Circuit Court or judge thereof (L. O. L., § 604); and it may be returnable either in term time or in vacation (L. O. L., § 608), in which latter case the matter is triable and judgment is given therein by the judge in like manner and with like effect as in term time. It thus appears that the judge has equal authority over the matter with the court itself. It is said in Section 958, L. O. L., that a “judge may exercise, out of court, all the powers expressly conferred upon a judge as contradistinguished from a court, and not otherwise,” and we find in Section 983, L. O. L.:

“When jurisdiction is, by the organic law of this state, or by this Code or any other statute, conferred

on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by the Code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

For the "spirit" of the matter, so-called, we refer to Section 103, L. O. L., which provides that:

"The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this Code, or by an order enlarge such time. * * "

2. Construing all these sections *in pari materia*, we are of the opinion that the order enlarging the time within which to make service of a copy of the writ upon the defendant Barton was a legitimate exercise of judicial authority.

As shown by the affidavit of Peter Wagener, the copy of the writ of review and a copy of the order extending the time within which the same might be served were in fact delivered to the defendant Barton in person and personally at St. Paul, Minnesota, on November 25, 1918, which was more than ten days prior to the time as extended, within which to make return. It is true that we find in Section 527, L. O. L., this language:

"No natural person is subject to the jurisdiction of a court of this state, unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached."

It is likewise a rule of law that a special appearance is not within the meaning of the clause "unless he appear in the court." The object of the special appearance is to challenge the jurisdiction of the court *in*

limine over the person who thus appears. The essence of the whole procedure in the County Court was to procure a road for the benefit of the real property of the defendant Barton situate in Hood River County. In limiting the jurisdiction of a court relating to property of a nonresident which is situated within this state "only to the extent of such property," it was not the intention of the law utterly to exempt from judicial authority of the state all realty owned by nonresidents. Neither does it mean only that the land of nonresidents shall be sold for the satisfaction of their debts, although that is a most common exercise of the judicial function respecting such property.

3, 4. The landed estates of nonresidents are subject to the police power of the state both for favorable and unfavorable action. In the instant proceeding the property of the nonresident Barton, if he be such, was subject to the jurisdiction of the court for the purpose of obtaining an advantage for his realty; and to that extent the property is within the authority of the judiciary. The nonresident cannot invoke the jurisdiction of the courts for the benefit of his realty and contend that the proceeding he invites cannot be reviewed. In the exercise of the police power the state has provided several means by which local realty of nonresidents can be affected. The power of taxation is the one most generally exercised, and that, too, without question. Again, we find that county roads may be laid out over the property of a nonresident, in which proceeding the only notice given is by posting up copies in three public places in the vicinity of the road and at the courthouse door. These are instances where the legislative authority has prescribed the means of giving notice of the proposed proceeding and affording to the land owner an opportunity to be heard.

In the instant proceeding it is required that the copy of the writ shall be served upon him by personal delivery. In our judgment, it was competent for the legislature to provide this method of service, and it is available as a means of acquiring jurisdiction over the defendant Barton to the extent of his land in this state. At the time of the hearing of his motion by special appearance, therefore, the court had before it in the affidavit of Wagener proof that the copy of the writ had been served upon Barton by personal delivery. In the wisdom of the legislature this has been declared to be sufficient to obtain jurisdiction over him to the extent of his property here. It disposes of the defects suggested by the first clause of his motion to the effect that no service had been made upon him. The Circuit Court should have disregarded that contention in the light of the situation presented on the record at the hearing of the motion.

5. Neither the County Court as a judicial tribunal nor the individuals who as officers compose such a court are proper parties to the writ of review: *Farrow v. Nevin*, 44 Or. 496 (75 Pac. 711); nor is it requisite that the copy should be served upon either the county judge or the commissioners. Moreover, it is a general rule that all papers directly affecting a court are properly delivered to the clerk of the court. Consequently the second ground of the motion was not well taken.

6, 7. Giving attention to the third specification of the motion, it is not contemplated by the statute that the order for the issuance of the writ should prescribe the manner in which the same is to be served. That is established by law, and it is not requisite that the order of the court should recite the statute. Serving the writ "according to the direction thereof," as indicated by Section 609, L. O. L., means to serve it

upon the parties to whom the process is directed. It is not required that the petition should be filed before the order is made, for the writ may be allowed by the court or judge thereof, and it is competent to apply directly to the judge for the writ and afterwards file with the clerk of the court the petition accompanied by the order for the writ.

8. Although not directly specified in the motion, it is argued under the general objection embodied in the fifth clause, that the petition does not state facts sufficient to show that the plaintiff is entitled to a writ, in that the county of Hood River is not made a party to the proceeding. It is true that in the title to the cause as it appears in the abstract, the county is not expressly named as a defendant; nor is it named as a defendant in the proceeding in the County Court to establish the road in question. The county is a defendant by operation of law, arising from the proceedings initiated by an individual to establish a road. Among others, one reason for holding the county to be a party is that it is responsible for any accident occurring upon such a road, happening to a traveler thereon who is himself without fault: Section 6375, L. O. L. The situation is analogous to that in which the statute makes the state a party defendant to every divorce case: Section 1020, L. O. L., as amended by Chapter 86, Laws 1911. Yet we never hear of the state's being named in the title of any divorce case, or of any allegation in the body of the complaint in anywise relating to the state. It has never been the practice to name the county as a party in proceedings in the County Court relating to the laying out of a public road. The proceeding to review the action of the County Court in such matters does not involve any new or different parties. All that is required to obtain the writ is a

petition aptly describing the proceeding to be reviewed and a proper bond, together with a specification of the errors assigned. The statement of the facts appearing in the description of the proceeding of the County Court as embodied in the petition for the writ gives rise to the legal conclusion that the county is a party to the proceeding in the Circuit Court. It is not necessary to support by averment what the law has already established.

9. The writ is directed to the court the decision of which is sought to be reviewed, or to the clerk or other officer having custody of its proceedings, and requires it or him to return said writ to the Circuit Court, within a time therein specified, with a certified copy of the record or proceedings: Section 607, L. O. L. The service of the writ is analogous to the service of a summons, and it is provided in Section 55, L. O. L., that if the action be against any county, the summons shall be delivered to the clerk of such county. Hence, in this case by analogy it is proper as a service upon the county to deliver the writ to the county clerk. As we have seen, the county clerk acknowledged service of the writ upon him at Hood River, in Hood River County, September 4, 1918, both in his capacity as clerk of the County Court, the tribunal of which the proceedings are sought to be reviewed, and as clerk of the defendant county.

In his brief in this court, however, the defendant Barton argues that the clerk had no authority in either capacity to admit service of the process so as to bind the county. In *Wilson v. Martin-Wilson Automatic Fire Alarm Co.*, 149 Mass. 24 (20 N. E. 318), the defendant was a Maine corporation doing business in the State of Massachusetts. The statute of the latter state required such corporations, before doing business

within its confines, to appoint the commissioner of corporations its true and lawful attorney upon whom all lawful process in any action or proceeding against it might be served. In a suit in equity, as we read in the report of the case, "service was accepted for the defendant by its attorney 'to the same extent that the plaintiff would have obtained service by leaving a copy of this writ with the commissioner of corporations, he having been duly authorized to receive service in accordance with the statute therein provided.'" The court held this to be a sufficient proof of service to enable the trial court to render a personal judgment against the defendant company.

10. In *South Publishing Co. v. Fire Association of Philadelphia*, 67 Hun, 41 (21 N. Y. Supp. 675), the defendant was a Pennsylvania fire insurance corporation. The laws of New York then in force were substantially like those of Massachusetts mentioned above, except that the superintendent of the insurance department was the officer upon whom process was required to be served. In that case the superintendent signed a written admission of service which he duly acknowledged and delivered to the plaintiff. The court upheld this service and proof thereof as giving jurisdiction over the cause. A like ruling was made in *Farmer v. National Life Assn.*, 67 Hun, 119 (21 N. Y. Supp. 1056). In *Atlantic & Gulf R. R. Co. v. Jacksonville etc. R. R. Co.*, 51 Ga. 458, it was held that the agent of a foreign corporation may acknowledge service of a declaration in an attachment, so as to authorize a general judgment against his principal. Within the reasoning of these cases we conclude that it was competent for the county clerk, as the officer upon whom service of process against the county should be made, to admit in his official character that such service

had been made, and that this would be binding upon the county so as to give the court jurisdiction over it in the determination of the merits of the writ of review. He is the officer upon whom service must be made as against the county. No good reason exists why his official admission of the fact that the writ was served upon him should not have equal weight with the official statement of the sheriff that he had served the same. The petition for the writ gives a full description of the proceeding of the County Court of which review is desired and specifies the errors relied upon with convenient certainty, so that it is not amenable to the objection that it does not state facts sufficient to authorize the issuance of the writ.

We are of the opinion that when the motion of the defendant Barton was heard, the Circuit Court had before it sufficient data to establish its jurisdiction over the whole subject matter of the proceeding and of his person, at least to the extent of his real property here involved, and that it was erroneous to quash and dismiss the writ. The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED. REHEARING DENIED.

MCBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued February 25, affirmed April 6, 1920.

IN RE FRIZZELL'S ESTATE.*

(188 Pac. 707.)

Homestead—Husband cannot Devise Away from Wife.

1. Under Section 1234, L. O. L. requiring court to set apart to widow and minor children the exempt property to be the property of the widow or minors, and Section 221, exempting the homestead, a widow gets the homestead in fee, and the husband cannot devise it to another, notwithstanding the provision of Section 226 that the homestead shall descend as if the exemption did not exist, which as a general statute must yield to the special, and therefore applies only where there is neither widow nor minor child.

Executors and Administrators—Statute for Benefit of Widow and Minors Liberally Construed.

2. Section 1234, L. O. L., authorizing the court to set aside to the widow and minors the exempt property as their property, was intended to protect the widow and child from want and from the acts of a possible improvident husband or father, and should be liberally construed in their interest.

Homestead—Statutes—Statute Entitling Widow to Exempt Property Applies to Homestead Thereafter Exempted.

3. Section 1234, L. O. L., authorizing the court to set aside to the widow and minor children the exempt property, applies to the homestead, though that was not exempted until after the original enactment of the statute, since the rule that an amendment to a statute adopted by a later act is not carried in the later act is limited to the adoption of a specific provision, not to the adoption of general laws.

Homestead—Homestead can be Set Aside to Widow Without Citation to Devisee.

4. The probate court can set aside the homestead property to a widow or minor child without citation to one to whom the decedent attempted to devise it, since the proceeding is in rem, binding on interested parties without personal notice.

Executors and Administrators—Separate Property of Widow to be Considered in Fixing Her Allowance.

5. In fixing the allowance to a widow from her husband's estate for support of herself and her minor child, her separate property, as well as the property of the estate, can be considered, and an allowance sufficient, with the income from her property, to support her in her accustomed state, is sufficient.

From Marion: GEORGE G. BINGHAM, Judge.

*Authorities discussing the question of rights of widow under homestead and exemption laws are collated in notes in 4 L. R. A. (N. S.) 391; L. R. A. 1917C, 365.

Department 2.

This is a proceeding by the widow, on behalf of herself and a minor child, to have the exempt homestead, consisting of a house and lot in the City of Salem, set aside to her as her own individual property, and to have an allowance set aside to her in addition, to the amount of \$100 a month for the first year after the death of her husband.

J. P. Frizzell, the husband of the petitioner, died on the fourth day of March, 1917, leaving an estate valued at about \$16,500. This estate included Lot 8, Block 85, of the City of Salem, which is the property principally involved in this suit, and which was the residence of the family at the time of his death. There was also a small amount of furniture, fixtures, etc., in the house, appraised at about \$450. There was also belonging to the estate 92 shares of capital stock of a cemetery association, valued at about \$4,600, and the balance of the estate was in cash and notes.

Mr. Frizzell and the petitioner, his widow, also owned together, a half interest in Lot 26, Block 7, Edes' Addition to Salem, which they seem to have held by the entirety, and which therefore became the property of the petitioner upon his death. This property seems to have been worth approximately \$2,000, and upon it there was a dwelling-house which has been rented at \$18 per month. The house and lot claimed as a homestead is valued at about \$5,000.

The deceased left a will in which he bequeathed a life interest in the homestead property to his wife, the petitioner herein, and the reversion, after her death, was bequeathed to Marvin Headrick, a grandchild. The stock in the cemetery association was bequeathed to Eithel F. Headrick and Edith F. Reynolds, daughters

by a previous marriage. The remainder of the estate was bequeathed to the petitioner herein.

The petitioner has renounced her claim under the will and elected to ask for her statutory exemption and allowance. She filed her petition in the County Court, asking that the homestead lot be set aside as exempt property, and also the furniture, etc., in the house, and that she be allowed the sum of \$100 per month for her support and maintenance during the first year. This is opposed by the legatees under the will, and by Lawrence A. McNary, as executor of the estate.

The County Court set aside the house and lot and the furniture to the widow, as her property, and also allowed her the sum of \$100 per month during the first year, as prayed for by the petitioner.

From this decision there was an appeal to the Circuit Court for Marion County, in which court the decision of the County Court was affirmed, except as to the allowance, which was reduced to \$50 per month. From this decree Marvin Headrick, the grandchild, appeals to this court, and the executor of the estate also appeals from that part of the decree allowing the \$50 per month. The petitioner filed a cross-appeal from that part of the decree reducing her allowance.

AFFIRMED.

For appellants, Marvin Headrick, minor, by Eithel F. Headrick, guardian, and Lawrence A. McNary, as executor of the estate, there was a brief over the names of *Mr. John W. Reynolds* and *Mr. Isaac H. Van Winkle*, with an oral argument by *Mr. Reynolds*.

For cross-appellant, Alice B. Frizzell, there was a brief and an oral argument by *Mr. Walter C. Winslow*.

BENNETT, J.—The most important question in the case is whether or not the right of a widow to the exempt homestead of her deceased husband is superior to that of a devisee under his will, so that she can have such homestead set apart absolutely to her, notwithstanding the will.

1. It is claimed by the appellant that the exempt homestead may be devised away by the husband in his will, and that if it is not disposed of by will, it will descend to the heirs, and cannot be set aside in fee to the widow and children under Section 1234, L. O. L.

That section provides:

“Upon the filing of the inventory, the court or judge thereof shall make an order, setting apart, for the widow or minor children of the deceased; if any, all the property of the estate by law exempt from execution. The property thus set apart, if there be a widow, *is her property*, to be used or expended by her in the maintenance of herself and minor children, if any; or if there be no widow, it is the property of the minor child; or if more than one, of the minor children in equal shares, to be used or expended in the nurture and education of such child or children, by the guardian thereof, as the law directs.”

Section 221 of the Code (L. O. L.), provides:

“The homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained. Such homestead must be the actual abode of, and owned by such family or some member thereof.”

Section 226 is as follows:

“The homestead aforesaid shall be exempt from sale on any judicial process after the death of the person entitled thereto for the collection of any debts for which the same could not have been sold during his lifetime, but such homestead shall descend as if death did not exist.”

There is an apparent contradiction between Section 226, which provides that the homestead shall descend as if death (exemption) "did not exist," and Section 1234, which provides "that all the property exempt from execution" shall be set apart to the widow, and "the property thus set apart is her property, to be used or expended by her in the maintenance of herself and minor children"; and if these sections are construed literally the conflict becomes absolute and irreconcilable.

In *Mansfield v. Hill*, 56 Or. 400 (107 Pac. 471, 108 Pac. 1007), the question as to the construction of Section 1234 was not really presented. In that case the widow had obtained a divorce from the deceased prior to his death, and was decreed the custody of the minor children, and was living separate and apart from him with said children; so that the property in dispute was not the "homestead of any family" at the time of the decease of the ex-husband. Notwithstanding these facts, however, the divorced wife claimed for herself and for the children, that the property in question was a homestead and was not subject to conveyance or devise by the deceased. Under these conditions the court, speaking of the statute of exemption, said:

"This law is only a statute of exemption, and contains no other elements. It does not create a homestead in which the wife or children have any right or title other than the right of owner thereof, or the wife, husband, agent, or attorney of such owner, to claim it exempt from attachment, levy, or sale on execution, and this right to claim such exemption continues after the death of the owner."

And again,—

"Therefore it is subject to devise or conveyance by the owner, or descends to the heirs under the statute."

In this opinion there is no reference whatever to Section 1234.

In *Wycoff v. Snapp*, 72 Or. 234 (143 Pac. 902), the question was again before the court under somewhat different conditions.

In that case, Wycoff had died leaving a wife and five minor children. After his death the homestead was set aside to the widow. Afterwards the widow was married again, and finally sold and deeded the property to one Cook. An action was brought by the minor children, through their guardian, to have the deed set aside, claiming the widow had no right to sell the property, and that she had wasted and dissipated the money received therefrom. The court, after quoting the section of the Code to which we have already alluded, said:

“We are again called upon to construe the homestead exemption act, which may truthfully be said to be one of the best intended and worst drawn laws upon the statute books. In *Mansfield v. Hill*, 56 Or. 400 (107 Pac. 471, 108 Pac. 1007), we had occasion to construe the words ‘such homestead shall descend as if death did not exist,’ which are meaningless in themselves, and, after much consideration, were of the opinion that by some oversight or clerical error the word ‘death’ had crept into the act in place of ‘exemption,’ and construed the act as if the sentence read ‘such homestead shall descend as if such exemption did not exist.’ The effect of this construction, to which we still adhere, is that the property descends to the heirs subject to the widow’s right of dower, and is exempt from execution for previous debts of the deceased.

“The property being thus exempt from exemption, it was competent for the County Court to set it apart to the widow for the support of herself and the minor children, as provided in Section 1234, L. O. L. As this section provides that the property so set apart to the widow ‘is her property,’ it follows naturally that

she takes a fee simple estate therein capable of alienation as well as of possession and enjoyment."

In that case, it is true, there was no will, and the property had not been devised; but, nevertheless, the question as to whether or not the legal title to the property could be and had been properly set aside to the widow, was squarely before the court, because, if it were not so properly set aside, and could not be set aside to her, then it descended to the heirs, and the children would have taken the title, subject to the widow's life estate, under the general provisions in relation to descent. We think the case at bar is governed by the decision in *Wycoff v. Snapp*, 72 Or. 234 (143 Pac. 902).

If it were a matter of first impression, we would still be compelled to reach the same conclusion, and to reconcile Section 226 of the Code and Section 1234, by holding that Section 226 was intended to establish the general rule, where there is no widow or children, in which case the property descends as if there were no exemption. But, when there is a widow, Section 1234, being a specific provision, having reference to that particular condition, prevails, and the property may be set aside for the widow and children.

We do not find any provisions of the Codes of any other state which are in all respects exactly like our own. But we think this construction of the statute is more in harmony with the general principles governing the construction of such statutes than any other.

2. The purpose of Section 1234, no doubt, was to protect the widow and children from want and destitution, and from the action of a possibly improvident husband or father, who might otherwise devise all his property away, and leave the widow and children without even a home.

In 1 Woerner on the Law of Administration (2 ed.), Section 94, it is said:

"The obvious intent of homestead laws is no less to secure a home and shelter to the family, when bereft of its father or mother, beyond the reach of financial misfortune, which even the most prudent and sagacious cannot always avoid, than to protect citizens and their families from the miseries and dangers of destitution by protecting the wife and children against the neglect and improvidence of the father and husband. The homestead exemption would be divested of its most essential and characteristic feature, if, upon the death of the head of the family, it should be withdrawn from the widow and children."

At another place in the same work it is said:

"The right of the surviving widow and minor children to the homestead premises, is obviously paramount to that of the deceased husband or father to dispose of them, else it would be in his power to defeat the intent and purpose of these laws. Hence a testamentary disposition of the homestead estate, inconsistent with the rights of the surviving family, is void."

We think a statute intended for so just and beneficial a purpose should be liberally construed in the interest of the widow and children. It follows that any devise by which the husband and father attempts to convey the property to other persons, by will, to take effect after his death, is void as against their claim to have the property set aside to them.

3. It is urged in the careful and able brief on behalf of the appellant, that because Section 1234 of the Code was passed originally in 1862, when there were no homestead exemptions, but only an exemption of personal property, that therefore it did not broaden with the exemption laws but should be construed with reference to the exemption statute as it was in 1862.

We think this contention is without merit. It is true that where an independent statute adopts the specific provision of some other enactment, an amendment to the adopted statute is not carried into the later one; but it is also true, that where the provision in the later law is general and refers to a general statute, a different rule applies.

This question was carefully considered in *State v. Ganong*, 93 Or. 440 (184 Pac. 233), in which the court by a decision, unanimous upon this point, upheld the rule as declared in *Ramish v. Hartwell*, 126 Cal. 443 (58 Pac. 920), in which it is said:

"This rule is subject to a qualified exception in cases of adoption into a special act of the provisions of law then in force by virtue of general laws. In such cases, subsequent modifications of the general law will be deemed to be within the intent of such adoption, so far as they are consistent with the purposes of the particular act."

Section 1234, in providing for the setting apart of exempt property, evidently intended that the property exempt *at the time of death*, should be set aside; and this is in accordance with the decision in *Wycoff v. Snapp*, 72 Or. 234 (143 Pac. 902), already referred to.

We hold, therefore, that the exempt homestead of the deceased husband and father, is properly set aside for the support of the widow and minor children, and that, where there is a widow, the title is vested in her, and it goes to her as a fee-simple estate.

4. There is a question made as to whether the probate court had jurisdiction to set aside this property, in the absence of a specific citation served upon the devisees under the will; but we see no reason why there should be such a citation in the matter of the setting aside of real property, any more than there

would be a necessity of a citation to the heirs, if personal property were to be set aside, and we think this has never been the practice.

In relation to this matter, it is said in Woerner on Administration:

“When, for any reason, it becomes necessary to set aside the homestead from the remaining real estate of the decedent, so as to designate the particular parcel or tract to which the homestead right attaches, the proceedings may generally be had in the probate court having control of the administration of the estate. The proceeding is *in rem* and it has been held that all parties interested are bound by it without personal notice.”

We think it has never been the practice in such cases in this state to require a citation.

In relation to the matter of the allowance, we are disposed to approve the order of the Circuit Court.

5. It is apparent that the income from the house would be scantily sufficient to support the widow and one child, under present conditions of living, even when helped out by the small rental from the petitioner's own individual property. On the other hand we think \$50 per month, with the receipts and income from the house and her own property, will be sufficient to support the petitioner and the one child in about the state to which they are accustomed.

The separate property of the wife, as well as the amount of the estate left by the deceased, are matters to be taken into consideration in fixing the allowance: 1 Woerner on Administration, § 87.

The decree of the Circuit Court is therefore affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

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1. The terms "claim of right," "claim of title," and "claim of ownership," when used to express adverse intent, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Adverse Possession—Possession of Vendee Under Contract.

2. The possession of a vendee of land under contract to purchase, whether oral or written, after payment of the entire purchase price, is presumptively adverse to that of his vendor from the time that such payment was made, and such possession is not prevented from being adverse by his knowledge of a defect in the title or a subsequent demand for a deed. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Adverse Possession—Possession Under Invalid Contract to Purchase.

3. Possession under an invalid contract to purchase land, if continued the requisite period after payment of the agreed price, will ripen into title, and such title will be equally as effective as if the same had been acquired under a valid contract. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Adverse Possession—Legal Owner to Take Notice of Extent of Claim.

4. An owner of premises is bound to take notice of the nature and extent of the possession by a claimant. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Adverse Possession—Continued Possession as Constituting *Prima Facie* Case.

5. Continued, unexplained possession of land for a long period of time is evidence that the possession is adverse and makes out a *prima facie* case, and, until rebutted by some satisfactory evidence, is conclusive as to the nature of the possession. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Adverse Possession—Title Acquired by Possession for Ten Years.

6. Title by adverse possession is acquired by the open, notorious, exclusive and uninterrupted antagonistic possession under a claim of ownership of land belonging to another for the full period of ten years by a person whose claim of ownership would not be in violation of some contractual duty owing by him to the owner of the land, such as a tenant holding under a lease or the like. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Adverse Possession—Possession of Purchaser from Vendee Adverse to Vendor.

7. After a purchaser from a vendee has paid his purchase money, his continued possession is deemed adverse to the vendee, and conse-

quently to the original vendor, although the latter has not been paid. (Bessler v. Powder River Gold Dredg. Co., 271.)

Adverse Possession—Effect of Releasing Vendee by Purchaser from Him.

8. Where purchaser from vendee paid his purchase money and took possession and vendee found that he could not get a deed from the original vendor, and the purchaser released the vendee from his obligation to secure a conveyance on payment of a certain sum to him with the understanding that it would not affect the purchaser's title to the land, such release did not prevent the possession of the purchaser from being adverse as against the original vendor. (Bessler v. Powder River Gold Dredg. Co., 271.)

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9. Though defendants piled brush and made a sort of temporary fence to stop cattle, they cannot be deemed in possession of the land up to the fence which was a temporary structure, so that they would acquire an adverse title, as plaintiff could not have maintained ejectment against them on account of the construction of such fence. (Schiffmann v. Youmans, 511.)

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Animals—Presumption Arising from Brands Stated.

2. Where two brands are found upon an animal, one older than the other, the presumption from the brands alone is that the owner-

ship of the animal belongs to the older brand, and ordinarily under such conditions the burden is upon the owner of the later brand to establish his right to put such brand upon the animal. (*State v. Moss*, 616.)

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Appeal and Error—Notice—Description of Judgment.

1. An appeal could not be sustained, notice being of appeal from decree of June 17th, the undertaking on appeal being indefinite as to date of decree, and there being nothing in the transcript to identify the decree mentioned in the notice with that shown in the transcript as rendered June 26th. (*Rohrbacher v. Strain*, 1.)

Appeal and Error—Ineffectual Attempt—Second Appeal.

2. An attempt to take an appeal, ineffectual because of misdescription of decree in notice of appeal, does not preclude taking of second appeal. (*Rohrbacher v. Strain*, 1.)

Appeal and Error—Findings of Trial Court of Strong Advisory Weight in Equity.

3. Since trial court has heard the witnesses orally, and has had a chance to observe their manner and appearance, and a much better opportunity to judge of their truthfulness than appellate court, findings and decisions of trial court have a very strong advisory weight with appellate court. (*Rohrbacher v. Strain*, 1.)

Appeal and Error—That Incompetent and Immaterial Evidence has been Disregarded by the Trial Court Sitting Without Jury Presumed.

4. Incompetent and immaterial evidence admitted upon the trial of a cause by the court without a jury is presumed disregarded by the court where there is other competent testimony to support the court's findings. (*Griffin v. Griffin*, 78.)

Appeal and Error—Right of Review—Inconsistent Act.

5. Act of plaintiff in suit for accounting by defendant as having wasted a trust fund, in obtaining an order for delivery to him of a life policy, which he had put up as security, held, not so inconsistent with his attitude on the trial as to defeat his appeal. (*Boehmer v. Silvestone*, 154.)

Appeal and Error—Decision Reviewable—Final Decree.

6. Decree dismissing, on the ground of a bequest to plaintiff being void, suit for accounting is final as regard his right of appeal, and not affected in that respect by his subsequently obtaining order permitting withdrawal from files a paper offered in evidence. (*Boehmer v. Silvestone*, 154.)

Appeal and Error—Serving and Filing Undertaking—Effect of Omission.

7. Failure to serve and file undertaking, one of the acts for perfecting appeal enumerated by Section 554, L. O. L., as amended by

Laws of 1913, page 619, concluding: "And after compliance with the provisions hereof the appellate court shall have jurisdiction of the cause, but not otherwise," does not defeat appeal, but is an omission after notice of appeal, correction of which, under Section 550, subdivision 4, may be permitted. (*Boehmer v. Silvestone*, 154.)

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8. The court on appeal will permit amendment of the return on the notice of appeal to correctly state the facts as to service. (*Boehmer v. Silvestone*, 154.)

Appeal and Error—Transcript—Sufficiency.

9. The transcript on appeal is sufficient where, taking it and the abstract together, the court has before it everything necessary to enable it to pass on the case. (*Boehmer v. Silvestone*, 154.)

Appeal and Error—Refusal of Continuance not Considered Where Bill of Exceptions Did not in Terms, Show That Continuance was Asked.

10. In replevin against sheriff for an automobile and tractor, an assignment of error for refusing a continuance until the minutes of the company from which plaintiff had purchased the property could be obtained could not be considered where bill of exceptions did not show in terms that continuance had been asked. (*Utah-Idaho Sugar Co. v. Lewis*, 224.)

Appeal and Error—Bill of Exceptions must be Accompanied by Authenticated Transcript of Testimony to Review Directed Verdict.

11. Assignments of error based on rulings relative to motions for nonsuit and directed verdict will not be considered where the transcript of the testimony, although certified by the court reporter, is not attached to the bill of exceptions, and is not authenticated by the trial court. (*Utah-Idaho Sugar Co. v. Lewis*, 224.)

Appeal and Error—Assignments of Error in Denying New Trial Insufficient Where Proceedings on Motion are not Authenticated.

12. Where an assignment of error based on denial of a motion for new trial is supported in the record only by a copy of the motion for new trial, to which are attached copies of certain affidavits and exhibits which are in no way authenticated except by the certificate of one of defendant's attorneys, with no record of rulings by the court or any counter-affidavits or other appearance by the plaintiff, or evidence as to whether the motion was filed within the statutory time, it will not be considered on appeal. (*Utah-Idaho Sugar Co. v. Lewis*, 224.)

Appeal and Error—No Reversal for Excessive Damages in Absence of Prejudicial Error.

13. Under Article VII, Section 3, of the Constitution, as amended by Laws of 1911, page 7, in a servant's action for injuries, where the jury was properly instructed, and there is no prejudicial error in the record, the only assignment of error being the amount of the verdict, it was for the jury only to find the amount of plaintiff's damages, and,

it having done so by unanimous verdict, the Supreme Court cannot reverse as for excessive damages, a ground of defendant employer's motion for a new trial. (*Malpica v. Cannery Supply Co.*, 242.)

Appeal and Error—Rulings on Prior Appeal Law of Case.

14. Where plaintiff's pleadings were held sufficient on a former appeal to entitle him to sustain his claimed title to land, the ruling upon such former appeal became the law of the case, and on a subsequent appeal it could not be said that a judgment for plaintiff was improper, where the evidence supported the allegations of plaintiff's pleadings. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Appeal and Error—Verdict Conclusive on Appeal.

15. In view of Article VII, Section 3, of the Constitution, where there is competent evidence to sustain the verdict, disputes as to different conclusions of fact which might reasonably be drawn from the circumstances of the case by the triers of the facts are set at rest by the verdict. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Appeal and Error—Costs on Modification of Decree—Prevailing Party.

16. Where upon appeal decree of lower court is modified in a substantial amount, appellant is entitled to costs and disbursements, unless for equitable reasons appellate court shall decree otherwise. (*Parks v. Smith*, 300.)

Appeal and Error—Notice of Appeal—Acceptance of Service by Attorney.

17. Where attorney for three defendants admitted service of notice of a cross-appeal by another defendant, signing himself as "attorney for [one of his clients] et al.," the acceptance of service was sufficient only as to the named client. (*Jubitz v. Gress*, 332.)

Appeal and Error—Notice of Appeal—"Adverse Party."

18. Three defendants in suits to foreclose mortgages, who appealed, held "parties adverse" to another defendant, cross-appellant, who failed to give them notice of his appeal, as required by statute; an "adverse party" being any party whose interest is in conflict with modification or reversal of the decision. (*Jubitz v. Gress*, 332.)

Appeal and Error—Appellant not Prejudiced by Instruction Leaving to Jury Undisputed Fact of Default by Other Party Waived by Appellant.

19. In purchaser's action to recover land contract payments on ground of mutual rescission, although evidence of at least a technical default by plaintiff appellee prior to date of alleged mutual rescission was undisputed, appellant was not injured by an instruction leaving to the jury the question whether or not there was such a prior default, where the evidence and pleadings showed conclusively that such prior default had been waived. (*Cornely v. Campbell*, 345.)

Appeal and Error—Admission of Evidence as to Conversation Between Parties at Making of Contract Harmless Action to Recover Payment Made Under Contract.

20. In purchaser's action to recover payment on ground of mutual rescission of contract, involving issue of whether contract was re-

scinded or forfeited, admission of evidence as to a conversation between the parties at time of original transaction with reference to recording of the contract *held* not prejudicial to vendor. (Cornely v. Campbell, 345.)

Appeal and Error—Defendant's Evidence Considered in Passing upon Action of Court in Denying Nonsuit.

21. Where defendant has not rested on a motion for a nonsuit, but has introduced testimony in his own behalf, that evidence can be considered to sustain a recovery on the part of the plaintiff. (Cornely v. Campbell, 345.)

Appeal and Error—Court will Eliminate Objectionable Interest Allowed by Judgment Instead of Reversing.

22. Under constitutional amendment of 1910 (Article VII, Section 3) giving Supreme Court right to eliminate objectionable portion of judgment, the court, in holding the judgment erroneous in including interest, will deduct from judgment the amount that might have been allowed as interest and affirm judgment as modified subject to respondent's acceptance of such reduction. (Cornely v. Campbell, 345.)

Appeal and Error—Finding Necessary to General Verdict must be Assumed, if Evidence Could Support it.

23. If the evidence could on any reasonable hypothesis support a finding for plaintiff on a material issue, such finding by the jury must be assumed to support the general verdict for plaintiff. (Cornely v. Campbell, 345.)

Appeal and Error—Contentions of Party are not Binding on Court.

24. It is no ground for rehearing that the opinion does not follow the contentions of counsel for the successful party, since the court is governed by fixed principles of law, not by the contentions of counsel. (Cornely v. Campbell, 345.)

Appeal and Error—View by Court Adds Advisory Weight to Finding of Court.

25. Regardless of the right of the court to use facts disclosed by view as substantive evidence, such a view adds to the advisory weight of the findings of the court. (Juanto v. Wright, 420.)

Appeal and Error—Admission of Evidence not Affecting Issue Harmless.

26. In action for value of services rendered, where defendant claimed that they were rendered under a lease of his land for one year which plaintiff abandoned and plaintiff denied execution of a one-year lease, or that the services were performed under it, testimony of plaintiff to the effect that there was some discussion about a five-year lease which was never executed could not have been prejudicial. (Miller v. Howard, 426.)

Appeal and Error—Appeal Perfected Five Days After Service and Filing of Undertaking.

27. In respect to the time for filing the transcript, an appeal was perfected June 20th, where notice of appeal was filed June 10th, and the undertaking on appeal was served and filed June 14th; five days

being allowed for excepting to the surety by Section 550, L. O. L., as amended by Laws of 1913, page 617. (Chandler v. Todd, 430.)

Appeal and Error—Order Extending Time for Filing Transcript After Time has Expired is Ineffective.

28. An order extending the time for filing the transcript made after the time as previously extended had expired was not made within the time allowed to file the transcript, as required by Section 554, subdivision 2, L. O. L., as amended by Laws of 1913, page 619. (Chandler v. Todd, 430.)

Appeal and Error—Filing of Transcript or Abstract Within Time Specified is Jurisdictional.

29. The filing of the transcript or the required abstract of the record within the time specified by the statute is jurisdictional, without which the Supreme Court has no authority to proceed to hear the case. (Chandler v. Todd, 430.)

Appeal and Error—Exclusion of Evidence not Reviewable Where Record Does not Show Evidence Expected.

30. Where it does not appear from the record what the offer of proof was, nor how the witness would have answered if permitted to do so, it will not be held on appeal that there was error in exclusion. (Booth-Kelly Lumber Co. v. Williams, 476.)

Appeal and Error—No Presumption of Error.

31. There is no presumption that the trial court erred, and error must affirmatively appear before a ruling on a motion for nonsuit will be disturbed. (Daniels v. Foster & Kleiser, 502.)

Appeal and Error—Order Sustaining Nonsuit cannot be Disturbed in Absence of Bill of Exceptions.

32. In an action by an executrix, who claimed that defendant had torn down a building belonging to her testator and had appropriated the lumber and fixtures, etc., where the trial court granted defendant's motion for nonsuit on the ground that the evidence did not show any demand by plaintiff on defendant for the property, *held* that, where there was neither bill of exceptions nor transcript of any part of the testimony, the order sustaining the nonsuit cannot be disturbed, even though the action be treated as one in *assumpsit*, for the pleadings did not show a conversion, and if the acts of defendant did not amount to a conversion in themselves, a demand was necessary. (Daniels v. Foster & Kleiser, 502.)

Appeal and Error—Conclusion of Trial Judge as to Weight of Testimony of Great Importance.

33. Conclusion by trial judge, in equity, who heard the witnesses and had opportunity to observe their demeanor, as to the weight of testimony, is of great importance. (Trueblood v. Talkington, 527.)

Appeal and Error—Party cannot Complain of Confirmation of Defendant's Title to Property Which He Did not Claim.

34. Where in a suit to cancel deeds to separate pieces of property plaintiff testified that he did not claim one of the pieces of property, did not want it, and was willing that it should be decreed to de-

pendant, he cannot on appeal attack the decree confirming defendant's title thereto. (*Mack v. Thatcher*, 551.)

Appeal and Error—Rulings on Former Appeal were Law of Case and Binding on Parties and Court.

35. A ruling, on a former appeal from an order granting a new trial, that an instruction should have been given, became the law of the case, binding alike upon the parties and the court. (*Kendall v. Travelers' Protective Assn.*, 569.)

Appeal and Error—Evidence not Sufficiently Different to Justify Refusal of Instruction Approved on Former Appeal.

36. In an action against a fraternal insurer for accident benefits, evidence *held* not sufficiently different from that on a former trial to justify refusal of an instruction approved on the former appeal. (*Kendall v. Travelers' Protective Assn.*, 569.)

Appeal and Error—Direction of Verdict Improper Where Court Ruled on Former Appeal That There was Question of Fact.

37. In an action against a fraternal insurer for accident benefits, on account of disability resulting from blood poisoning claimed to have been due to a wound inflicted by a barber while removing an ingrowing hair, a directed verdict was properly denied where the court ruled, on a former appeal from an order granting a new trial, that it was a question of fact whether the means producing the injury were accidental or not. (*Kendall v. Travelers' Protective Assn.*, 569.)

Appeal and Error—Drawing of an Obvious Conclusion from Admitted Facts is not the Decision of an Issue of Fact.

38. Where the physical facts were such that at the relative speed of the motor truck which plaintiff was driving and together with the speed of the train he must have seen the train which struck his truck had he looked, the action of the appellate court in so declaring is not open to objection as decision of a question of fact. (*Olds v. Hines*, 580.)

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39. An order, requiring defendants to return the corporate records of one of the defendants, including certain records specified, to the state and bring them into court for inspection and use on the trial, and to keep them in the state for such inspection, was not appealable under Section 548, L. O. L., as an order determining the action or suit so as to prevent a judgment or decree, or any other provision of that section, or as an order amounting to a peremptory writ of *mandamus*. (*Baillie v. Columbia Gold Mining Co.*, 609.)

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1. "Admitting to bail," or "allowing bail," as it is sometimes termed, is a judicial act which purely ministerial officers, such as clerks of court, have no authority to perform, in the absence of an express statute; but by "allowing bail" or "admitting to bail" is not meant the formal justification, subscription, or acknowledgment by the sureties, the term first mentioned relating to the order determining that the offense is bailable and fixing the amount of undertaking, and "taking the bail" meaning the final acceptance or approval of it by the court, and an undertaking was valid although justification of sureties was before the clerk. (*Clatsop County v. Wuopio*, 30.)

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1. Where defendant alleged that, holding as trustee the note sued on, he transferred it without recourse to himself, and the complaint did not show the indorsement of a negotiable instrument without recourse, no implied warranty created by the Negotiable Instruments Act (Section 5898, L. O. L., et seq.) arises on the theory that the transfer was an indorsement of a negotiable instrument without recourse. (Smith v. Barner, 486.)

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Cancellation of Instruments—Collusive Divorce Agreement—Cancellation of Note and Mortgage.

2. In divorced wife's suit to have note and mortgage to husband canceled upon ground that they were void and without consideration because executed pursuant to collusive divorce agreement, wife held entitled to cancellation as against objection that, if note and mortgage were against public policy, no relief should be granted, since wife could successfully defend in suit to foreclose mortgage upon ground that it was void and without consideration. (*Hodler v. Hodler*, 180.)

Cancellation of Instruments—Party to Void Note and Mortgage Though in *Pari Delicto*, may Sue to Cancel Obligation Before Maturity.

3. Conceding that parties to an agreement, void because a collusive divorce agreement, were in *pari delicto*, equity has jurisdiction to cancel note and mortgage, given pursuant thereto, when suit is brought before the maturity of the obligation; the maker of the note not being sufficiently protected by defense which she might make on the note and mortgage if they were sued on by an innocent purchaser for value. (*Hodler v. Hodler*, 180.)

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Want of Consideration must be Pleading.

See Mortgages, 6.

CONSTITUTIONAL LAW.

Constitutional Law—Complaint as to Constitutionality of Statute not Considered in Absence of Injury.

1. It cannot be contended that the portion of Section 4568, L. O. L., as amended by Laws of 1917, page 154, Section 2, which reads, "and if in his opinion the organization of such bank is justified," confers upon the superintendent of banks an arbitrary power and that the same is unconstitutional, unless the person complaining has strictly complied with the provisions of such section. (*Mulkey v. Bennett*, 70.)

Constitutional Law—Statute Presumed to be Constitutional and to Embrace Only One Subject.

2. Every legislative act is presumed to be constitutional, and the conflict between a statute and the Constitution should be palpable before a legislative enactment should be held to be void on the ground that it embraces more than one subject or because the subject is not sufficiently expressed in the title. (*Lovejoy v. Portland*, 459.)

Constitutional Law—Waters and Watercourses—Limiting Right to Vote on Issuing Bonds of Irrigation District not a Deprivation of Privileges.

3. Laws of 1917, page 762, Section 29, relating to the issuance of bonds by an irrigation district, and allowing every owner of one acre of land or more to vote, is not invalid as violating Article I, Section 20, of the Constitution, and Section 1, of the 14th Amendment of U. S. Constitution, as depriving smaller land owners of equal privileges and immunities. (*Gard v. Henderson*, 520.)

See Banks and Banking, 1.

Court Will Eliminate Objectionable Interest Allowed by Judgment, Instead of Reversing.

See Appeal and Error, 22.

CONSTRUCTION.

See Boundaries, 2.

See Wills, 5.

Pleadings in Mortgage Foreclosure Suit Construed.

See Action, 1.

The Word "Provided" Construed.

See Municipal Corporations, 8.

Allegations in Complaint to be Liberally Construed Where not Objected to.

See Pleading, 6.

Constitutional Provision to be Liberally Construed.

See Statutes, 3.

Subject in Constitutional Provisions to be Given a Broad Meaning.

See Statutes, 4.

Title to Act Regulating Insurance Held Sufficient.

See Statutes, 5.

CONTEST.**Contest of Bond Issue Election.**

See Schools and School Districts, 1-4.

CONTINUANCE.

See Appeal and Error, 10.

See Criminal Law, 1.

CONTRACTOR.

See Municipal Corporations, 9-11.

See Principal and Surety, 1.

CONTRACTS.**Contracts—Representation Made Recklessly Without Knowledge of Truth Fraudulent.**

1. One of the elements respecting a fraudulent statement warranting a rescission of a contract is that the one making it must either know that it is false, or make it recklessly without any knowledge of its truth and as a positive assertion. (*Palmiter v. Hackett*, 12.)

Contracts—Contract for Divorce.

2. Where husband and wife made property agreements "in anticipation of a divorce about to be procured," and where husband facilitated trial of wife's divorce suit by making trip for special purpose of being served, did not appear in suit, and permitted wife to obtain divorce on grounds which he knew to be false, the transaction held an agreement by which wife should procure divorce, and as such void as against public policy. (*Hodler v. Hodler*, 180.)

Contracts—Return of Money Paid Under Collusive Agreement.

3. Court, in canceling divorced wife's note and mortgage to husband on ground that they were executed pursuant to collusive divorce agreement, will not decree return of money actually paid thereon; the

contract, as to money paid over, being an executed contract, and wife being without a remedy in regard thereto. (*Hodler v. Hodler*, 180.)

Contracts—Discharged by Destruction of Subject Matter.

4. Where from the nature of the contract it is evidence that the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse performance. (*Crane v. School District No. 14*, 644.)

Contracts—Discharged by Impossibility of Performance by Act of Law.

5. One of the conditions implied in a contract is that the promisor shall not be compelled to perform if performance is rendered impossible by an act of law. (*Crane v. School District No. 14*, 644.)

Contracts—Performance of Unqualified Contract not Excused by Impossibility Due to Unforeseen Contingency.

6. Generally, when one voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen it becomes impossible for him to do the act or thing he agreed to do. (*Crane v. School District No. 14*, 644.)

See Adverse Possession, 2, 3.

See Appeal and Error, 20.

See Logs and Logging, 1-8.

See Principal and Agent, 3.

See Schools and School Districts, 5, 6, 9, 10.

Changing Action from Trespass to Contract Properly Allowed.

See Pleading, 3.

Stipulation in Contract That Railroad Expense Bill Should Govern Quantity of Cordwood was Binding.

See Sales, 2.

Without Possession Oral Contract to Devise Land not Enforceable.

See Specific Performance, 2.

Lessee not to Claim Possession Under Oral Contract to Purchase.

See Statute of Frauds, 1.

Possession Taking Oral Contract to Convey Land Out of the Statute.

See Statute of Frauds, 2.

Rescission of.

See Vendor and Purchaser, 1-13.

CONTRIBUTORY NEGLIGENCE.

Is a Question for the Court When Only One Conclusion is Possible from the Evidence.

See Negligence, 1.

CORPORATIONS.**Corporations—Corporate Property not to be Sold in Controversy Between Stockholders.**

1. In a suit by a stockholder against other stockholders and against the corporation to have a trust declared in lands belonging to the corporation, etc., arising out of fraud of defendant stockholders, the property of the corporation will not be sold, where another stockholder, not a party to the action, will be prejudiced, and plaintiff on prevailing, if satisfaction cannot be had from the other stockholders under the judgment, will be given a lien for his proportionate share in the corporation; fraud having been false representations as to cost of the corporate property. (*Thimsen v. Reigard*, 45.)

Corporations—Stock Subscription may be Made in Either Property or Services Under Agreement Providing Therefor.

2. Payment for stock subscribed may be made in property or services, if so agreed upon between corporation and subscriber; but, in absence of such agreement, the subscription is deemed payable in cash. (*Brockway v. Ready Built House Co.*, 386.)

Corporations—Corporation's Debt to Subscriber may, Under Agreement With Corporation, be Credited upon Amount Due upon Unpaid Subscription.

3. As between a solvent corporation and a subscriber who is a creditor of the corporation, the parties may agree that the debt owing to the subscriber may be credited upon the payment due from him upon an unpaid subscription. (*Brockway v. Ready Built House Co.*, 386.)

Corporations—Subscriber's Unliquidated Claim not to be Set Off in Equity Against Subscription.

4. In absence of agreement or equitable ground of relief, a subscriber having an unliquidated claim against a corporation cannot go into equity and have the claim there liquidated and set off against the amount due on subscription; the corporation having a right to have the validity of the claim tried at law with the aid of a jury. (*Brockway v. Ready Built House Co.*, 386.)

Corporations—Allowance of Claim of Subscriber and Credit for Amount in Payment of Assessment, Legal.

5. In absence of fraud, corporation may allow claim presented for machines furnished or services rendered by subscriber and credit amount in payment of assessment. (*Brockway v. Ready Built House Co.*, 386.)

Corporations—Liable for Agent's Conversion of Goods Used in Its Business.

6. Where an automobile manufacturer's agent in charge of its factory branch, in connection with which it operated a garage and repair-shop, converted articles left on the premises by a dealer formerly acting as its local agent, and the articles were such as one would naturally expect to find in a garage or repair-shop, and most of them could have been rightfully purchased by him under his admitted authority, it was liable for their value in an action on implied contract. (*Wentworth v. Winton Co.*, 541.)

COSTS.**Costs—May be Refused on Reversal in Law Action.**

1. In an action at law, though the appeal has resulted in reversal of judgment for plaintiff, the defendant need not be allowed a judgment for costs and disbursements. (*Levine v. Levine*, 94.)

Costs—Of Transcript Properly Divided Where Plaintiff had Benefit of Transcript Filed by Defendant.

2. Where both parties appealed, and plaintiff had the benefit of the transcript filed by defendant, the costs of the transcript would be divided. (*Hodler v. Hodler*, 180.)

Costs—Allowance on Appeal Denied in View of Oppressive Conduct.

3. Where plaintiff's conduct was oppressive and unneighborly, the appellate court may refuse to allow him costs and disbursements on appeal, even though affirming the decree in his favor. (*Schiffmann v. Youmans*, 511.)

On Modification of Decree.

See Appeal and Error, 16.

COUNTERCLAIM.

See Mortgages, 1.

COUNTIES.**Counties—Claim for Injuries from Defective Highway not Required Before Suit.**

1. An action for damages for injuries from defective highway can be brought against county without first presenting claim for damages to county court; the presentation of such claim being unnecessary where the controversy is over a tort. (*West v. Marion County*, 529.)

Liable Where Defective Road Contributing Cause of Accident.

See Highways, 5.

See Private Roads, 2.

COURTS.**Courts—Part of Opinion Relating to Power of Legislature to Enact General Laws Concerning Municipal Corporations not Obiter Dictum.**

1. Where, on appeal, the court had for consideration, first whether a port was a "municipality" within the purview of Article XI, Section 2, of the Constitution, and, second, whether that section prohibited the legislature from enacting general laws affecting corporate bodies embraced within it, the decision of the first question in the negative did not render a decision in the same opinion as to the second question *obiter dictum*. (*Lovejoy v. Portland*, 459.)

Courts—Property of Nonresidents is Subject to Jurisdiction of Court Relative to Establishment of Roads Advantageous to Owner.

2. The landed estates of nonresidents being subject to the police power of the state both for favorable and unfavorable action, such

property is subject to the jurisdiction of the state courts relative to the establishment of a road of public easement for the benefit thereof. (Holland-Washington Mortgage Co. v. County Court of Hood River County, 668.)

See Divorce, 10, 12-18.

See Private Roads, 1, 2.

CRIMINAL LAW.

Criminal Law—Good Cause Shown for Continuance.

1. Where an attorney appeared on date set for trial and showed that defendant's attorney had enlisted in the United States army and was unable to be present at the trial, and that defendant had not been able to obtain counsel, and that absent counsel possessed all the facts constituting defense, the court had good cause for continuing the case for the next term of court, and defendant cannot complain; there being nothing to show that the continuance was against his wishes. (Clatsop County v. Wuopio, 30.)

Criminal Law—Authority to Commit Crime not Inferred from Employment of Agent by Defendant.

2. Authority to commit a criminal act can never be inferred from the mere fact that the alleged agent was in the lawful employ of defendant. (State v. Moss, 616.)

Criminal Law—Admission of Ownership Held Insufficient to Show That Accused Disfigured Brands on Stolen Cattle.

3. In a prosecution for larceny of cattle which had been found carrying defendant's brand apparently superimposed upon an older brand, the mere fact that defendant said he thought some of the cattle were his was insufficient to connect him with the disfigurement of the brands. (State v. Moss, 616.)

Criminal Law—Cattlemen Could Testify as Experts as to Brands upon Animals Stolen.

4. In a prosecution for larceny, where defendant's brand had been found superimposed upon another brand on the animals stolen, it was not error to permit old cattlemen of long experience to testify as experts in relation of the growth of brands with the growth of the animal and the effect of a second burn on the old scar. (State v. Moss, 616.)

Criminal Law—Instruction as to Effect of Brands to Show Ownership Held Erroneous as Invading Province of Jury.

5. In a prosecution for larceny of cattle, an instruction that, if the company claiming to be owner of the stolen animals had "placed its brand on any of the animals, it is sufficient evidence" that the animals belonged to it, was erroneous as invading the province of the jury. (State v. Moss, 616.)

Criminal Law—What Deemed "Evidence to Support Verdict"—"Satisfactory Evidence."

6. The mere existence in a criminal case of any competent evidence, however conclusive, any circumstance, however remote, which a jury would have a right to consider if submitted along with other

evidence, is not "evidence to support the verdict" within the constitutional provision, in view of Section 697, L. O. L., providing that evidence is deemed satisfactory which ordinarily produces moral certainty and conviction in an unprejudiced mind, and that such evidence alone will justify a verdict. (State v. Moss, 616.)

CRUEL AND INHUMAN TREATMENT.

See Divorce, 19.

CRUELTY.

Depends on Degree of Refinement of Person Affected.

See Divorce, 20.

CUSTODY OF CHILDREN.

See Divorce, 1-9.

Husband Seeking Custody of Children Awarded to Wife upon Divorce has Burden to Show Conditions Warranting Change.

See Habeas Corpus, 1.

DAMAGES.

Damages—Twelve Thousand Dollar Verdict for Broken Wrist and Impaired Arm not Invalid.

1. Where a servant injured through a fall of staging sustained a broken wrist and was subjected to great pain and mental anguish, while the wrist was permanently injured so that the servant could not use it or his hand, the use of his arm being greatly impaired, the Supreme Court will not set aside verdict for \$12,000, though trial court stated he was of opinion recovery should not be for more than \$2,000. (Malpica v. Cannery Supply Co., 242.)

Excessive Damages No Grounds for Reversal Unless There is Prejudicial Error.

See Appeal and Error, 13. .

For Misrepresentation in Exchange of Property.

See Fraud, 3.

For Purchaser's Failure to Remove Timber Within Time Required by Contract.

See Logs and Logging, 1-8.

A Verdict for Fifteen Thousand Dollars not Excessive.

See Trespass, 1.

Treble Damages Allowable, Though not Claimed in Complaint.

See Trespass, 2.

DEATH.

Death—Action to be Maintained Directly by Beneficiary.

1. Under employers' liability law, Section 4, as to action for loss of life due to negligence, the action is to be maintained directly by whatever beneficiary is entitled to sue, and not through any intermediary. (Wilcox v. Warren Construction Co., 125.)

Death—Statute Creates Several not Joint Cause of Action in Favor of Widow and Lineal Heirs Which Dies With Her.

2. Under employers' liability law, Section 4, giving a right of action for death to the widow of the person killed, his lineal heirs "or" adopted children, the widow has the exclusive right to sue for death of her husband in her own name; and, where she does not prosecute, her cause of action dies with her, and the husband's lineal heirs, children by a former wife, cannot maintain the action. (*Wilcox v. Warren Construction Co.*, 125.)

Death—Persons Entitled to Sue.

3. Employers' liability law, Section 4, enumerating persons who may sue for death, is in derogation of common law, and its terms are not to be expanded by implication. (*Wilcox v. Warren Construction Co.*, 125.)

DEEDS.

Deeds—Deed Between Partners Conveying All of Government Lot by Number as Originally Surveyed.

1. Deed from one partner to another, describing one of the tracts conveyed as "lot 2 in section 26, township 25 south, range 13 west, Willamette meridian. * * Also all the following described tide-land in said county of Coos, State of Oregon, being the tide-lands owned by [the partners]. The tide-lands lying east of and adjoining lot 2, section 26, township 25 south, range 13, W., W. M."—conveyed the whole of lot 2 as originally surveyed and platted by the government, without regard as to whether the lands were uplands or tide-lands, or whether the grantor partner obtained his interest through patent from the government to the remote predecessor of the partners, or through purchase from the state by the partners. (*Merchant v. Marshfield Trading Co.*, 439.)

Deeds—Evidence—Conveyance of Property by Name Known to and Used by Parties Valid.

2. If parties to a conveyance knew the particular tract by a name which they had adopted for it, the deed to the property by such names was a good description, and extrinsic evidence may be invoked to show that they had so known and designated the property among themselves, and therefore intended to convey it by the name. (*Merchant v. Marshfield Trading Co.*, 439.)

Deeds—Evidence Held to Show Undue Influence by Real or Imagined Fears of the Plaintiff's Wife.

3. Where plaintiff, 87 years old and blind and deaf, joined his wife in conveying to defendant, her nephew, who was living with them, property purchased with plaintiff's money, being induced by her fears, caused either by defendant's threats or by her hallucination that defendant would leave them helpless, plaintiff's conveyance was not the act of his will and will be set aside. (*Mack v. Thatcher*, 551.)

Party cannot Complain of Confirmation to Property Which He Did not Claim to Own.

See Appeal and Error, 34.

Monuments will Control Courses and Distances in Construing Deed.

See Boundaries, 2.

In Escrow not Wrongfully Delivered.

See Escrows, 1.

Suing to have Deed Adjudged a Mortgage.

See Mortgages, 10.

When Mortgagee will be Treated in Equity as Owner.

See Mortgages, 11.

DELIVERY.

Of Deed Left in Escrow.

See Escrows, 1.

DEMAND.

Demand and Refusal.

See Appeal and Error, 32.

See Trover and Conversion, 1.

Unnecessary Where There has Been Conversion.

See Trover and Conversion, 3.

No Cause of Action Against Trustee for Refusal to Deliver Funds Until Demand for Accounting.

See Trusts, 13.

DEMURRER.

Not an Admission of Facts not Alleged.

See Mandamus, 2.

Answer may Aid Complaint as Against Demurrer.

See Pleading, 2.

To Answer Admits Its Truth.

See Pleading, 10.

DISCRETION.

School Boards have Discretion as to Closing Schools on Account of Epidemic.

See Schools and School Districts, 8.

DISCRETION OF COURT.

See Writ of Review, 2.

DISMISSAL AND NONSUIT.

See Appeal and Error, 21.

Order Sustaining Nonsuit will not be Disturbed in Absence of Bill of Exceptions.

See Appeal and Error, 32.

DIVORCE.**Divorce—Decree for Custody of Children Final While Conditions Remain Same.**

1. A decree fixing the custody of a child is final when conditions existing at the time of its rendition remain the same, and should be modified only when conditions have changed, and then only for the child's best interests. (Griffin v. Griffin, 78.)

Divorce—Decree Awarding Custody of Children Given Effect in Another State Until Conditions Change.

2. In the absence of fraud or want of jurisdiction affecting its validity, a divorce judgment awarding the custody of their minor children should be given full force and effect in other states as to the right of custody at the time and under the circumstances of the decree's rendition, although it has no controlling effect in another state as to facts and conditions arising subsequently, and the courts of such other states may, upon change of facts and conditions, award the custody otherwise than in the original decree. (Griffin v. Griffin, 78.)

Divorce—Decree Awarding Custody of Children Res Adjudicata in Another State Only as to Facts and Conditions Before Decree.

3. A divorce decree of one state awarding custody of minor children is not *res adjudicata* in the courts of another state, except as to facts and conditions before rendition of the decree, and as to subsequent facts and conditions it has no extraterritorial force. (Griffin v. Griffin, 78.)

Divorce—Decree Ordering Custody of Children not Binding Under Full Faith and Credit Clause in Other State in Which They have Become Domiciled.

4. A divorce decree of one state ordering the custody of a child is not binding upon the courts of another under the full faith and credit clause of the federal Constitution after the child has become domiciled in the latter state. (Griffin v. Griffin, 78.)

Divorce—Decrees for Custody of Children Should be Modified Only upon Proper Notice to Adverse Party.

5. As a general rule, an application for a modification of a divorce decree as to custody of the children should be made to the court upon proper notice to the adverse party. (Griffin v. Griffin, 78.)

Divorce—Right of Divorced Parent Having Custody of Children to Change Domicile upon Complying With Decree.

6. A California divorce decree awarding custody of minor children to the mother, permitting the father to visit them at stated times, and providing that the children should not be removed from the jurisdiction without the court's permission, does not prevent the mother taking them from the state by the court's permission from changing her domicile to another state, where the divorce was absolute, since, the minor children being in the mother's custody, her residence is their residence. (Griffin v. Griffin, 78.)

Divorce—Decree Reawarding Custody of Children of Divorced Parents Void for Defective Service.

7. A notice attempted to be served in Oregon upon a divorced wife, a *bona fide* resident of Oregon, for modification of a California interlocutory divorce decree as to custody of minor children, was without extraterritorial force, and not being served upon the mother's attorney, and she not appearing at the hearing, and the ten days after service required by the citation for appearing not being in accordance with the spirit of Code of Civil Procedure of California, Sections 410, 1005, the decree rendered upon such citation awarding the children to the father was not valid. (Griffin v. Griffin, 78.)

Divorce—Effect of Final Decree on Modification Changing Custody of Children.

8. Since, in view of Civil Code of California, Sections 131, 132, a California court in making a final decree in a divorce action would not, without a notice and hearing, change the interlocutory decree as regularly modified and reverse the same as to the care and custody of children, and deprive a party of his or her day in court, where a second modification of interlocutory decree as to custody of children was void, it did not affect the final decree, which did not purport to change the status of the parties as established by the interlocutory decree and modifications. (Griffin v. Griffin, 78.)

Divorce—Admission of Evidence of Facts Prior to Decree upon Question of Changing the Custody of Children.

9. In a proceeding to modify a divorce decree as to custody of children, the change of circumstances, the conduct of the party, the morals of the parents, their financial condition, the children's age and devotion of either parent to the children's best interests, are controlling, and it was not error to admit testimony of facts and circumstances prior to the rendition of the divorce decree which would aid in determining if the conditions were changed. (Griffin v. Griffin, 78.)

Divorce—Final Judgment for Alimony in One State Entitles Plaintiff to Sue for Enforcement of "Debt" Therefor in Other State.

10. Where a suit terminates in a divorce decree, providing for the custody and maintenance of a minor child and for alimony to the wife, that part of the decree relating to divorce is protected by Article IV, Section 1, of U. S. Constitution, relating to full faith and credit, as are also the provisions as to maintenance and alimony, if they are finalities, an alimony decree being generally considered a "debt" of record as much as any other judgment for money; and in another state, where the distinction between actions at law and suits in equity are preserved, plaintiff may resort to an action at law to enforce the debt created by the decree. (Levine v. Levine, 94.)

Divorce—Plaintiff, to Whom Alimony Payable, Proper Party to Sue Therefor in Another State.

11. Where a divorce decree of one state required defendant to pay installments for alimony for maintenance "to the plaintiff," she is the proper party to bring action in another state to recover for unpaid installments. (Levine v. Levine, 94.)

Divorce—Courts of One State not Required to Enforce Alimony or Maintenance Decree of Other, if Subject to Modification by Rendering Court.

12. If a part of a divorce decree of another state relating to alimony or maintenance is not final, but is subject to modification by the court rendering it, then neither Article IV, Section 1, of U. S. Constitution, relating to full faith and credit, nor comity, compels the courts of another state to enforce that part of the decree, since no other than the court rendering the decree could undertake to administer relief without bringing about conflict of authority. (Levine v. Levine, 94.)

Divorce—Where Court has Power to Modify Accrued Installment of Alimony or Maintenance, Decree is not Final, Within Full Faith and Credit Clause.

13. Whether an accrued installment of alimony is to be treated as a final judgment, entitled to protection of Article IV, Section 1, of U. S. Constitution, relating to full faith and credit, must be determined by the law of the state in which the decree is entered, and if the law of such state gives discretionary power to modify an accrued installment, then such installment does not come within such constitutional provision. (Levine v. Levine, 94.)

Divorce—Decree for Maintenance and Alimony Subject to Modification as to Accrued Installments not Entitled to Full Faith and Credit in Other State.

14. In view of Gen. Stats. Minn. 1913, Sections 7123, 7129, having been construed by the Minnesota Supreme Court as giving the decreeing court discretionary power to modify the divorce decree as to alimony and maintenance and revoke or change the amount of matured installments, because of change of conditions since original adjudication, which is not *res judicata* as to subsequent conditions, the decree is not final as to maintenance and alimony, and not within the protection of Article IV, Section 1, of U. S. Constitution, relating to full faith and credit as to such matured installments. (Levine v. Levine, 94.)

Divorce—Requirement That Plaintiff Allege and Prove Alimony in Maintenance Decree a Finality to Recover Thereon in Another State.

15. Plaintiff, bringing law action to collect past-due installments on divorce decree for alimony and maintenance, is not entitled to the full faith and credit of the decree, under Article IV, Section 1, of U. S. Constitution, unless she alleges and proves the decree's finality as to alimony and maintenance installments past due; but such installments are entitled to full faith and credit where, after they have become due, they are decreed or adjudged by the original court to be presently payable. (Levine v. Levine, 94.)

Divorce—Decree for First Installment of Alimony Held Sufficiently Final in Sister State to Entitle to Judgment.

16. A decree for present payment of a fixed sum as alimony or maintenance, even though not absolutely final under the law of the state where rendered, is nevertheless, when unpaid, at least *prima facie* final in a sister state, and, in the absence of evidence to the

contrary, is sufficient to support a judgment in the sister state, so that plaintiff is entitled to a judgment for the first installment of alimony, due at time of rendition of original decree. (*Levine v. Levine*, 94.)

Divorce—Alimony Decree for Money Presently Due Treated in Sister State as Final Decree Until Modified.

17. In an action for judgment for past installments of alimony and maintenance, if the original decree had been modified as to amounts due at date of original decree, such modification would be enforced, or, if defendant asked time of the state in which enforcement is sought, he would be allowed to proceed in the court of original instance to modify the decree; but, until the decree is modified in the state of its origin, it is to be treated as a final judgment. (*Levine v. Levine*, 94.)

Divorce—Alimony and Maintenance Installments not Enforceable in Sister State Until Adjudicated into Fixed Sum Payable Presently.

18. In an action for past-due installments of alimony and maintenance upon a decree in a sister state, from an averment that on a certain date "and for more than two years prior thereto plaintiff and defendant were husband and wife," and the subsequent averment that the suit terminated in a divorce decree, awarding alimony in installments, "the first payment to be October 20, 1913," the inference may be drawn that the first installment was payable on the date of rendition of the decree and may be enforced; but subsequent installments may not be enforced until adjudication in state of original decree transforms them into a fixed sum payable presently. (*Levine v. Levine*, 94.)

Divorce—Evidence of Wife's Cruelty Showing Ground for Divorce.

19. In a husband's divorce suit for cruel and inhuman treatment, where the evidence showed a year or more of domestic peace after the marriage, and that thereafter the relations of the parties became estranged until they reached the breaking point, and reconciliation apparently became impossible, notwithstanding efforts to bring about an adjustment of differences, decree for plaintiff husband was proper, and will be affirmed. (*Plummer v. Plummer*, 307.)

Divorce—Cruelty Depends on Degree of Refinement of Person Affected.

20. Cruelty is a question of fact dependent upon the circumstances and individuals involved, and what would be cruelty to a delicate, sensitive woman might not be so to a brawling fishwife. (*Button v. Button*, 578.)

See *Contracts*, 2.

DOMICILE.

Right of Divorced Parent Having Custody of Children to Change Domicile upon Complying With Decree.

See *Divorce*, 6.

DRAINS.

Drains—Land Owner cannot Complain That Earth from His Land was Thrown on Adjacent Land to Make Barrier Where "Plan" Made No Provision for Such Method.

1. The "plan" required by Laws of 1915, p. 540, relating to the formation of drainage districts, need not specify the disposition of earth to be excavated; a "plan" contemplating the representation of anything drawn on a plane, as a map or chart. Hence a land owner cannot complain that, though the plan for ditch did not so provide, earth excavated was placed on the west side of the ditch on the land of another owner to serve as a barrier against high water; the work being carried on under the direction of officers of the district. (Arstill v. Fletcher, 308.)

Drains—Plan Approved by Drainage Officers Conclusive in Absence of Fraud.

2. Under Laws of 1915, page 540, the officers of a drainage district have authority to approve plans for construction of a ditch, and, in the absence of fraud, the plan as approved by the County Court cannot be reviewed collaterally by any other tribunal. (Arstill v. Fletcher, 308.)

ELECTIONS.

Contest of Bond Election not Provided for.

See Schools and School Districts, 2-4.

Bond Issue Election Conclusive on Collateral Attack.

See Schools and School Districts, 4.

EMINENT DOMAIN.

Eminent Domain—Raising Street Grade Constitutes No Additional Burden upon Surrounding Property.

1. A municipal council may raise the grade of a street, and such action constitutes the imposition of no additional burden upon surrounding property. (Ukase Inv. Co. v. Portland, 176.)

EMPLOYERS' LIABILITY ACT.

See Death, 1-4.

See Master and Servant, 4.

EQUITY.

Equity—Jurisdiction Dependent on Facts Existing at Time of Complaint.

1. Jurisdiction of equity must depend on the actual facts as they exist at the time the complaint was filed and the relief which is sought to be obtained by both the plaintiff and the defendant as evidenced by the pleadings. (Hodler v. Hodler, 180.)

Equity—Property Owner Failing to Object to Making and Accepting of Street Paving Improvement on Other Than Original Plan cannot Object to Assessment Therefor.

2. In a suit to cancel city street paving assessments, where the city secured a better and safer improvement at less cost than under the established grade plan on which it had declared its intention to improve, and plaintiff by failing to object lured the city to make and accept the improvement, he does not come into equity with clean hands. (*Gardner v. Portland*, 378.)

When not Necessary to Offer to Do Equity.

See Cancellation of Instruments, 1.

Equity will Enjoin Wrongful Cutting of Standing Timber.

See Injunction, 1.

Suit to Enjoin Cutting of Timber may be Maintained Though Boundary Line was Disputed.

See Injunction, 2.

When Equity will Require Specific Performance of Oral Lease for More Than One Year.

See Specific Performance, 1.

ESCROWS.

Escrows—Evidence Sufficient to Sustain Finding That Deed was not Wrongfully Delivered.

1. In an action to cancel deed, evidence held sufficient to show that third party, with whom plaintiff left blank deed in escrow, had delivered deed to defendant, an innocent purchaser, in violation of instructions. (*Bohrbacher v. Strain*, 1.)

ESTATES OF DECEDENTS.

Legatees Entitled to Appeal from Allowance of Claim by County Court Against Estate.

See Executors and Administrators, 1, 2.

ESTOPPEL.

See Trusts, 1.

By Agreement to Pay for Street Improvements by Installments.

See Municipal Corporations, 4.

EVIDENCE.

Evidence—No Presumption of Knowledge of Ordinances.

1. The proposition that every man is presumed to know the law applies only to the general laws of the land, and not to city ordinances, except in proceedings in municipal courts, in view of Section 90, L. O. L. (*Palmiter v. Hackett*, 12.)

Evidence—No Judicial Notice of Official Character of Sheriff of Other State.

2. A court of one state cannot take judicial notice of the official character of a sheriff of a county in another state. (*Griffin v. Griffin*, 78.)

Evidence—Common Learning as to Meaning of Conjunction Placed Before Last of Series.

3. It is common learning as a matter of grammar that when in an enumeration of persons or things the conjunction is placed immediately before the last of the series, the same connective is understood between the previous members. (*Wilcox v. Warren Construction Co.*, 125.)

Evidence—Letter Signed by Vice-president Inadmissible Where No Authority Shown.

4. In a replevin action against sheriff to recover a tractor and an automobile which had been attached, a letter signed by the vice-president of the company from which plaintiff had purchased the property, proposing the organization of a corporation to become a binding contract upon acceptance, was not admissible to show ownership of the property by the judgment debtor in the attachment suit; there being no evidence of the vice-president's authority. (*Utah-Idaho Sugar Co. v. Lewis*, 224.)

Evidence—Effect of Admissions of Counsel.

5. Where plaintiff's counsel at the trial admitted that a drainage ditch constructed over plaintiff's land was constructed with authority, and the only contention was over the disposition of the earth excavated, plaintiff cannot recover on the theory that private property cannot be taken under Constitution, Article I, Section 18, for public use without just compensation. (*Arstill v. Fletcher*, 308.)

Evidence—Answer in Former Action Between the Parties Admissible as an Admission.

6. In purchaser's action to recover payment on ground of mutual rescission of contract in year of 1912, where vendor denied such rescission and claimed a forfeiture in year 1913, an answer by vendor in a previous suit between the parties held admissible as an admission for purpose of showing from allegations therein that contract was rescinded in 1912. (*Cornely v. Campbell*, 345.)

Evidence—Credibility of Witness for Jury.

7. Jury had a right to believe either of two witnesses giving conflicting testimony or to believe part of the testimony of each one of the witnesses and disbelieve the remainder of their testimony if they thought it was unreasonable or if there was a conflict between it and other direct testimony. (*Cornely v. Campbell*, 345.)

Evidence—Defendant has Burden of Proving Specific Defense in Nature of Setoff.

8. The claim of defendant that he returned or left on the yards a certain number of cords of wood, with which his account should be credited, is in the nature of an offset or payment, and the court, after plaintiff had made out a *prima facie* case, properly charged

the jury that defendant had the burden of proving his specific defense. (*Booth-Kelly Lumber Co. v. Williams*, 476.)

Evidence—Where Note is Indorsed Without Recourse, Parol Evidence is Inadmissible to Explain Indorsement.

9. Under Section 5898, L. O. L., where a note is indorsed without recourse, the statutory terms and provisions become a part of the indorsement, and parol evidence is not admissible to explain the written indorsement or in defense, as is the case where the transfer is by delivery only. (*Smith v. Barner*, 486.)

Evidence—Parol Evidence can Add to Minutes of Contract of Hiring of Municipal Employee.

10. Where the council minutes recited merely the appointment of a waterworks engineer, oral evidence was admissible to show an agreement that the engineer might procure the services of his father when he was absent. (*Hornig v. Canby*, 612.)

Evidence—Judicial Notice That Nine Months is School Year.

11. It is a matter of common knowledge that nine months constitute the current school year in Oregon, and that a longer or shorter period is an exception; schools generally throughout the state commencing on the second or third Monday of September and continuing for a period of nine months, known as the current school year. (*Crane v. School District No. 14*, 644.)

See Appeal and Error, 4, 20, 21, 24-26.

See Boundaries, 1.

See Criminal Law, 5, 6.

See Divorce, 19.

See Escrows, 1.

See Highways, 2-5.

See Larceny, 3-7.

See Negligence, 1.

See Trial, 3.

See Vendor and Purchaser, 9, 12.

See Wills, 1, 2, 7, 8.

Evidence Excluded not Reviewable Unless Record Shows Evidence Expected.

See Appeal and Error, 30.

Admission of Deed Record to Show Plaintiff's Purchase of Property Replevied.

See Attachment, 1.

Conveyance of Property by Name Known to and Used by Parties Valid.

See Deeds, 2.

Held to Show Undue Influence.

See Deeds, 3.

Admission of Facts Prior to Decree upon Question of Changing Custody of Children.

See Divorce, 9.

Sufficient to Take Question of Employment to Jury.

See Master and Servant, 3.

Sufficient to Warrant Instruction as to Wrongful Repudiation of Contract by Vendor.

See Vendor and Purchaser, 3.

EXCEPTIONS, BILL OF.**Exceptions, Bill of—Application for Extension—Oral Notice.**

1. Under Rule No. 53 of the Circuit Court, a bill of exceptions, tendered by appellants within extended time allowed by Circuit Court on their application after oral notice to respondent's attorneys of their intention so to apply, was tendered in good time. (*Thomsen v. Giebisch*, 118.)

Exceptions, Bill of—Use of Form Prescribed With Transcript of Whole Testimony Sufficient.

2. A bill of exceptions conforming to the form prescribed by the proviso in Laws of 1913, page 651, and so having transcript of the whole testimony is sufficient. (*Thomsen v. Giebisch*, 118.)

Exceptions, Bill of—Judge must Authenticate the Testimony.

3. Under Sections 172, 932, L. O. L., authentication of the testimony for purpose of bill of exceptions must be by the judge; the reporter's certificate indicating only *prima facie* correctness. (*Thomsen v. Giebisch*, 118.)

Exceptions, Bill of—Signing by Other Than Trial Judge Allowed by Stipulation.

4. The appellate court will not decide whether the bill of exceptions could properly be settled by a judge other than the one who tried the case; the acceptance thereof by attorneys providing that they will not object to any judge signing it on the ground that it should have been signed by the trial judge. (*Thomsen v. Giebisch*, 118.)

See Appeal and Error, 10, 11.

Order Sustaining Nonsuit will be Affirmed in the Absence of Bill of Exceptions.

See Appeal and Error, 32.

EXCHANGE OF PROPERTY.**Exchange of Property—Fraudulent Concealment.**

1. Where one exchanging a building for other real property has actual knowledge of a city ordinance prohibiting the use of a building simultaneously as a garage and as a residence, he is guilty of fraud where he states that the first floor was rented as a garage for \$25 a month, and the second floor for \$25 as living or house-keeping rooms, and that the property could be continued for the uses named; the other person not knowing of the ordinance. (*Palm-iter v. Hackett*, 12.)

When No Damages for Misrepresentation in Land Exchange.

See Fraud, 3.

EXECUTION.**Execution—False Representations by Purchaser or Judgment Creditor to Prevent Competition Avoids Sale.**

1. As a general rule, false representations made by a purchaser or by a judgment creditor to prevent competition will render a sale void, and if the representation is untrue, it is usually immaterial whether the person making the representation did or did not know of its falsity. (*Chandler Inv. Co. v. Matlock Inv. Co.*, 394.)

Execution—Person Having Valid Interest in Property to be Sold may Announce His Interest.

2. If a party has an interest in or a valid claim against property to be sold under execution, he may announce such interest or claim without invalidating sale. (*Chandler Inv. Co. v. Matlock Inv. Co.*, 394.)

See *Mortgages*, 8, 9.

EXECUTORS AND ADMINISTRATORS.**Executors and Administrators—Executor and Legatee Entitled to Appeal from Allowance of Claims Against Estate.**

1. The executor and trustee of an estate as such may, in his representative capacity, appeal from an order allowing a claim against the estate, and where such executor was the next of kin and a beneficiary under the will, he has such an individual interest as will entitle him to appeal from the allowance of the claim. (*Latourette v. Nickell*, 323.)

Executors and Administrators—Executor's Appeal from Order Allowing Claim not Affected by Order Requiring Payment.

2. The right of an executor to appeal from an order of the county judge, directing him to pay a claim, given by Section 1241, L. O. L., cannot be abridged by the County Court by an order requiring him to pay the claim under penalty of removal. (*Latourette v. Nickell*, 323.)

Executors and Administrators—Payment of Claims Without Order of County Court No Ground for Removal.

3. That an executor paid out funds of the estate without order of the County Court is no ground for removal, in view of Section 1241, L. O. L., providing for payment of claims found just by the executor although the more prudent course is for an executor to procure an order of court before paying out money. (*Latourette v. Nickell*, 323.)

Executors and Administrators—Petition held to State Conclusions and No Ground for Removal of Executor.

4. A petition, stating that the executor wrongfully paid money to persons not entitled to the same, and that such moneys should have been paid to claimant, etc., does not state grounds for removal of the executor; the allegations being mere conclusions of the pleader. (*Latourette v. Nickell*, 323.)

Executors and Administrators—Foreign Administrator may Sue in Individual Capacity on Foreign Judgment Obtained by Him in Spite of Statute.

5. Judgment recovered in another state by administrator for defendant's refusal to deliver intestate's funds invested in capacity of trustee, or deliver securities purchased, could be made the basis of a cause of action, notwithstanding Section 761, L. O. L., limiting administrator's authority to jurisdiction of government under which he was invested with his authority, since such action can be brought by administrator in its individual capacity, both original cause of action and cause of action to enforce judgment having accrued subsequent to intestate's death. (*Reed v. Hollister*, 656.)

Executors and Administrators—Statute for Benefit of Widow and Minors Liberally Construed.

6. Section 1234, L. O. L., authorizing the court to set aside to the widow and minors the exempt property as their property, was intended to protect the widow and child from want and from the acts of a possible improvident husband or father, and should be liberally construed in their interest. (*In re Frizzell's Estate*, 681.)

Executors and Administrators—Separate Property of Widow to be Considered in Fixing Her Allowance.

7. In fixing the allowance to a widow from her husband's estate for support of herself and her minor child, her separate property, as well as the property of the estate, can be considered, and an allowance sufficient, with the income from her property, to support her in her accustomed state, is sufficient. (*In re Frizzell's Estate*, 681.)

EXEMPTIONS.

See Executors and Administrators, 6, 7.

See Homestead, 1-3.

FALSE REPRESENTATIONS.

To Prevent Competition at Sheriff's Sale.

See Execution, 1, 2.

See Mortgages, 8, 9.

FINDINGS.

See Schools and School Districts, 6.

Of Trial Court Strong Advisory Weight in Equity.

See Appeal and Error, 3.

Finding Necessary to General Verdict must be Assumed if Evidence Could Support It.

See Appeal and Error, 23.

Finding Should not be Made on Issue Outside Case.

See Appeal and Error, 25.

See Trial, 3.

Of Trial Judge as to Weight of Testimony of Great Importance.

See Appeal and Error, 33.

That Deed was not Wrongfully Delivered.

See Escrows, 1.

Failure to Find on Material Issues Held Error.

See Logs and Logging, 1.

Finding of Negligence Held Warranted.

See Master and Servant, 4.

Findings must Dispose of All Issues Raised by Pleadings.

See Trial, 2.

FORECLOSURE.

See Mortgages, 1-4, 8, 9.

See Municipal Corporations, 11.

Pleadings in Mortgage Foreclosure Suit Construed.

See Action, 1.

Failure to Make Agent a Party in Foreclosure not Fatal, Where Principal is a Party.

See Mortgages, 5.

Chilling Bidding at Sheriff's Sale.

See Mortgages, 8, 9.

FOREIGN JUDGMENT.

Foreign Administrator may Sue in Individual Capacity on Foreign Judgment Obtained by Him in Spite of Statute.

See Executors and Administrators, 5.

FORFEITURE.

See Vendor and Purchaser, 1-13.

FRAUD.

Fraud—Mere Silence not Fraud Where No Duty to Speak.

1. Individuals dealing at arm's-length must look out for themselves, and mere silence is not fraud where no duty is imposed upon one to speak, but a half truth spoken with the design of influencing the opposite party, where he has not equal means of knowledge, is in itself fraudulent. (Palmiter v. Hackett, 12.)

Fraud—One Making Reckless Statement of Fact must Disclose Subsequent Knowledge of Falsity.

2. If a party is so reckless as to make a statement which in fact is untrue and while negotiations are in progress he discovers it is not true, it is his duty to state the whole truth to the other party. (Palmiter v. Hackett, 12.)

Fraud—No Damages for Misrepresentation in Land Exchange Transaction Where Property Exchanged is of Equal Value.

3. A party to a land exchange transaction cannot recover damages for misrepresentations made by adverse party in effecting transaction where they receive property of equal value. (Parks v. Smith, 300.)

Statement Made Recklessly Without Knowledge of Truth Fraudulent.

See Contracts, 1.

Fraudulent Concealment of Effect of City Ordinance.

See Exchange of Property, 1.

False Representations by Purchaser or Judgment Creditor to Prevent Competition Avoids Sale.

See Execution, 1, 2.

Burden of Proving Counterclaim for Fraud.

See Mortgages, 1.

See Wills, 6.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FULL FAITH AND CREDIT.

See Divorce, 3-7, 10, 11, 13, 14.

See Judgment, 1.

GOOD FAITH.

See Joint Adventures, 3.

See Municipal Corporations, 7.

GUARDIAN AND WARD.**Testamentary Capacity not Lost by Guardianship.**

See Wills, 1.

HABEAS CORPUS.**Habeas Corpus—Husband Seeking Custody of Children Awarded to Wife upon Divorce must Prove Conditions Warranting Change.**

1. Where the custody of children was awarded to the wife in a divorce decree in California, and the children became domiciled with the mother in Oregon, in a *habeas corpus* proceeding by the father, it was incumbent upon him to show that conditions had so changed since the granting of the divorce decree as to warrant a change in custody. (Griffin v. Griffin, 78.)

HARMLESS ERROR.

See Appeal and Error, 20, 26.

HIGHWAYS.**Highways—Municipal Corporations—State can Determine Whether City or County shall Control.**

1. Both a city and a county in public governmental capacities are agents of the state, which in its sovereign capacity may supervise them as instrumentalities, and through the legislature direct which shall have jurisdiction over and control of the highways located within the confines of each in a way not inconsistent with the state Constitution. (Patterson v. Ashland, 233.)

Highways—Whether Automobile Driver had Obtained License Held Jury Question.

2. In action against county for injuries to automobile driver from defective highway, question as to whether driver had obtained the license required by Section 6375, L. O. L., held for jury. (*West v. Marion County*, 529.)

Highways—Accident Subsequent to One in Which Plaintiff was Injured Inadmissible.

3. In automobile driver's action for injuries from defective highway, evidence of another accident at a period long after the occurrence of the accident in which the plaintiff had been injured was not admissible for the purpose of showing notice of defect to defendant county, or for any purpose. (*West v. Marion County*, 529.)

Highways—Evidence of Condition of Road at a Time Subsequent to Accident Held Admissible.

4. In action for injuries from defective highway, evidence as to condition of road a year subsequent to the occurrence of the accident was admissible upon a showing that the condition of the road had not changed during the year. (*West v. Marion County*, 529.)

Highways—County Liable Where Defective Road Contributing Cause of Accident.

5. If automobile driver was blinded by lights of approaching car and was injured in swerving from road because of road's defective condition, county was liable notwithstanding negligence of driver of other automobile, since the defect in the road was one of the contributing causes of the accident. (*West v. Marion County* 529.)

Public Highways Within City Subject to Improvement by City.

See *Municipal Corporations*, 8.

State Board of Control has No Authority to Sell Bonds to Meet or Equal Federal Aid Act.

See *States*, 1-3.

HOMESTEAD.

Homestead—Husband cannot Devise Away from Wife.

1. Under Section 1234, L. O. L. requiring court to set apart to widow and minor children the exempt property to be the property of the widow or minors, and Section 221, exempting the homestead, a widow gets the homestead in fee, and the husband cannot devise it to another, notwithstanding the provision of Section 226 that the homestead shall descend as if the exemption did not exist, which as a general statute must yield to the special, and therefore applies only where there is neither widow nor minor child. (*In re Frizzell's Estate*, 681.)

Homestead—Statutes—Statute Entitling Widow to Exempt Property Applies to Homestead Thereafter Exempted.

2. Section 1234, L. O. L., authorizing the court to set aside to the widow and minor children the exempt property, applies to the

homestead, though that was not exempted until after the original enactment of the statute, since the rule that an amendment to a statute adopted by a later act is not carried in the later act is limited to the adoption of a specific provision, not to the adoption of general laws. (In re Frizzell's Estate, 681.)

Homestead—Homestead can be Set Aside to Widow Without Citation to Devisees.

3. The probate court can set aside the homestead property to a widow or minor child without citation to one to whom the decedent attempted to devise it, since the proceeding is in rem, binding on interested parties without personal notice. (In re Frizzell's Estate, 681.)

HYPOTHETICAL ALLEGATION.

Held Immaterial, not Presenting an Issuable Fact.

See Pleading, 5.

IMPROVEMENTS.

See Municipal Corporations, 14-18.

Expenses of Local Street Improvement.

See Municipal Corporations, 1, 2.

Authority to Pave Street and Assess Special Benefits.

See Municipal Corporations, 3.

Public Highways Within City Subject to Improvement by City.

See Municipal Corporations, 8.

Oral Lease for More Than One Year Specifically Enforced on Account of Improvements Made by Tenant.

See Specific Performance, 1.

INDICTMENT.

See Larceny, 1.

INFANTS.

Infants—State may Determine Status of Infant Citizens.

1. The state as *parens patriae*, has the undoubted right to determine the status or domestic and social condition of infant citizens domiciled within its territory. (Griffin v. Griffin, 78.)

INJUNCTION.

Injunction—Equity will Enjoin Wrongful Cutting of Standing Timber Forming Principal Value of Property.

1. Equity will intervene to prevent the cutting of standing timber when such timber constitutes the principal value of the estate, for in the very nature of things an action for damages to recover the value of the timber cut, or treble damages, is an adequate remedy. (Schiffmann v. Youmans, 511.)

Injunction—Action to Enjoin Cutting of Timber may be Maintained Though Boundary Line was Disputed.

2. While a suit to enjoin a trespass cannot be used to determine the location of a disputed boundary, nevertheless a suit to enjoin the cutting of standing timber which was the principal value of an estate may be maintained where defendants made a dispute over the boundary the pretext for removing the timber. (*Schiffmann v. Youmans*, 511.)

A Decree Enjoining Collection of Assessment for Street Improvement Does not Bar Reassessment.

See *Municipal Corporations*, 5.

INSTRUCTIONS.

See *Appeal and Error*, 19, 36.

See *Criminal Law*, 5.

See *Vendor and Purchaser*, 3, 6.

Requested Instruction as to Right to Recover Payment Improper as Ignoring Other Party's Theory of the Case.

See *Trial*, 1.

Exact Language of Requests Need not be Embodied in Instructions Given.

See *Trial*, 4.

Refusal to Give Requested Instruction, When not Reversible Error.

See *Trial*, 5.

INSURANCE.

Title to Act Regulating Insurance Held Sufficient.

See *Statutes*, 5.

Accident Insurance not Covered by Policy Given.

See *Trial*, 7.

INTENT.

See *Partnership*, 1.

Words or Conduct of Vendor Indicating Intention not to be Bound, Warrant Rescission by Purchaser.

See *Vendor and Purchaser*, 13.

INTEREST.

Interest—Stipulation as to Interest on Account Enforceable.

1. Where, under contract for sale and delivery of cordwood, it was stipulated that a certain amount was owing by defendant on account of prior transactions, and that interest should accrue on such amount from date of contract, contention that amount was part of an open, mutual, running account, and therefore should not be subject to interest, cannot be sustained. (*Booth-Kelly Lumber Co. v. Williams*, 476.)

**Court will Eliminate Objectionable Interest Allowed by Judgment,
Instead of Reversing.**

See Appeal and Error, 22.

Contractors' Surety Liable for Interest.

See Principal and Surety, 1.

Purchaser Recovering Payments not Entitled to Interest.

See Vendor and Purchaser, 4.

INTOXICATING LIQUORS.

**Intoxicating Liquors—Unincorporated Trustees of Estate Operating
Brewery not Forbidden by Ordinance to have Retail License—
"Association."**

1. Unincorporated trustees of an estate, operating brewery of deceased, do not come within the terms of an ordinance, providing that no retail liquor license shall be granted either by original issue or transfer to any corporation, copartnership, or association of persons, but the same may be granted to the individual members of a firm or copartnership, as an association may be defined to be a body of persons acting together without a charter, but on the methods and forms used by incorporated bodies for the prosecution of the common enterprise. (*Jubitz v. Gress*, 332.)

**Intoxicating Liquors—Transfer of Retail License by Authorization of
Trustees of an Estate Having Equitable Interest in License not
Invalid.**

2. A contract whereby trustees of an estate of a deceased brewer, who had advanced money to lessee of hotel to procure a liquor license, permitted the lessee to transfer the license to another lessee on consideration that they would be protected by the mortgage given by such latter lessee to owner of hotel was not an invalid transfer of a liquor license; the ordinance expressly authorizing transfer of licenses, and trustees not coming within prohibited class mentioned in the ordinance. (*Jubitz v. Gress*, 332.)

INVESTMENT.

Investment of Trust Funds by Trustee.

See Trusts, 8, 9.

IRRIGATION.

Limiting Right to Vote on Issuing Bonds on Irrigation District.

See Constitutional Law, 3.

JOINT ADVENTURES.

Joint Adventures—Rights as Between Members Controlled by Principles of Partnership.

1. The rights of joint adventurers in matters between themselves are governed by the principles constituting and controlling the law of partnership. (*Thimsen v. Reigard*, 45.)

Joint Adventures—Member may not Make Secret Profit.

2. Where plaintiff and defendant entered into a joint adventure consisting in purchasing land for resale, defendant had no right to purchase the land from himself, either directly or indirectly, or to make profit on the deal, except with the full knowledge and consent of plaintiff. (Thimsen v. Reigard, 45.)

Joint Adventures—Burden on Member to Show Good Faith.

3. Where plaintiff and defendant entered into a joint adventure consisting in purchasing certain land for resale, defendant to act as plaintiff's agent in purchasing the property, the burden of proof was upon such defendant, in an action by plaintiff for an accounting on account of secret profits made by him, to show that he fully informed plaintiff of all the facts within his knowledge bearing upon the transaction. (Thimsen v. Reigard, 45.)

JUDGMENT.

Judgment—Full Faith and Credit Clause Applies Only to Final Adjudication in One State Sued on in Another.

1. Article IV, Section 1, of U. S. Constitution, requires that full faith and credit shall be given in each state to the judicial proceedings of every other state; but in order to maintain an action on a money judgment recovered in another state the judgment must be a final adjudication in full force in the state where rendered, capable of being there enforced by final process. (Levine v. Levine, 94.)

Judgment—Recovery must be Based on Allegations of Complaint.

2. In an action on a complaint seeking to enforce defendant corporation's liability to pay for the use of premises solely upon the agreement of its agent with plaintiff lessee, no liability of the company to pay for the premises merely because possession was turned over to it can be enforced. (Wentworth v. Winton Co., 541.)

Judgment—Of Other State Conclusive in Action to Enforce it.

3. Judgment of court of general jurisdiction of other state having jurisdiction over defendant's person either by regular service of process or voluntary appearance, in a proceeding so stated in the pleadings as to call for the exercise of the court's jurisdiction if pertinent to the issues raised by such pleadings, is final and conclusive when pleaded as a ground of action in this state. (Reed v. Hollister, 656.)

Judgment—Of Other State may not be Attacked in Action Thereon For Errors at Trial.

4. Though defendant, when sued on the judgment of a sister state, may challenge the jurisdiction of the court, of the subject matter, and of his person, and complain that the judgment was not one authorized by the pleadings, yet, under constitutional provision requiring full faith and credit to be given to the judgment of a sister state, cannot be attacked because of mere errors committed by the court during the trial of the case. (Reed v. Hollister, 656.)

See Divorce, 10-18.

See Executors and Administrators, 5.

Undertaking Being Indefinite as to Date of Decree.

See Appeal and Error, 1.

Court will Eliminate Objectionable Interest Allowed by Judgment Instead of Reversing.

See Appeal and Error, 22.

JUDICIAL NOTICE.

See Evidence, 2.

That Nine Months is School Year.

See Evidence, 11.

JURISDICTION.

See Courts, 2.

See Writ of Review, 1.

Filing of Transcript or Abstract Within Time Specified is Jurisdictional.

See Appeal and Error, 29.

Dependent on Facts Existing at Time of Complaint.

See Equity, 1.

Over and Control of Highways Located Within Confines of a City and County.

See Highways, 1.

KNOWLEDGE.

See Contracts, 1.

See Evidence, 1.

See Fraud, 1, 2.

See Principal and Agent, 2.

See Trusts, 4.

LANDLORD AND TENANT.**Landlord and Tenant—Tenant on Shares Surrendering Before Productivity cannot Recover of Landlord for Services.**

1. Where the lessee of a dairy ranch, who was to share the profits with the landlord, surrendered possession before the ranch had become productive, he could not recover of the landlord for services rendered. (Martin v. Weiss, 35.)

LARCENY.**Larceny—Indictment—Variance.**

1. Where plaintiff was indicted under Section 1950, L. O. L., denouncing the crime of larceny by stealing cattle, the indictment must be considered solely with reference to that offense, and a conviction cannot be sustained on proof that defendant, in violation of Section 1954, knowingly defaced brands on cattle. (State v. Moss, 616.)

Larceny—Burden of Proof.

2. In a prosecution under Section 1950, L. O. L., for larceny of cattle, the state has the burden of proving that the cattle were property of individuals named as owners in the indictment, and that defendant took or asported the animals. (State v. Moss, 616.)

Larceny—Evidence.

3. In a prosecution under Section 1950, L. O. L., for the larceny of cattle, where it appeared that the animals defendant was charged with stealing were on open range, *held* that, though brands thereon had been obliterated, etc., and though defendant and his hired man were in proximity to the cattle which were with a larger number admittedly belonging to defendant, such facts did not show an asportation. (State v. Moss, 616.)

Larceny—Finding of Defendant's Brand upon Animal Stolen Insufficient in Itself to Justify Conviction.

4. The finding of one man's brand upon another man's cow is not alone sufficient to justify a conviction of larceny. (State v. Moss, 616.)

Larceny—Evidence That Defendant's Brand is upon Stolen Cattle is Admissible.

5. In a prosecution for larceny of cattle, evidence that defendant's brand is found upon the animals alleged to have been stolen, with or without a disfiguration of the old brands, is admissible. (State v. Moss, 616.)

Larceny—Evidence Held Insufficient to Show That Defendant Placed His Brand upon Stolen Cattle.

6. In a prosecution for larceny of cattle, that about 300 of the stolen animals were found in one small valley on a public range used by defendant as a sheep range, that defendant's employee was seen in the vicinity, and that the cattle bore defendant's brand, was insufficient to connect defendant with the branding. (State v. Moss, 616.)

Larceny—Evidence as to Possession of Stolen Goods Admissible, Although not Recent or Exclusive.

7. In larceny cases the fact of possession of the stolen goods by defendant is admissible, notwithstanding such possession is not recent or exclusive, although such fact may not in itself be sufficient to raise a presumption of guilt. (State v. Moss, 616.)

LAW OF THE CASE.

See Appeal and Error, 14.

Binding on Parties and Court.

See Appeal and Error, 35.

LEASE.

A Mortgage Given by Mother-in-law of Lessee to Secure Performance of Lease is a Sufficient Consideration.

See Mortgages, 7.

When Oral Lease for More Than One Year will be Specifically Enforced.

See Specific Performance, 1.

LIABILITY.

Of Trustee for Trust Funds Deposited in Bank.

See Trusts, 7.

LICENSES.

Trustees Operating Brewery, not Forbidden by Ordinance to have Liquor License.

See Intoxicating Liquors, 1.

Transfer of Liquor License Issued to Trustees Operating Brewery for Estate not Invalid.

See Intoxicating Liquors, 2.

LOGS AND LOGGING.

Logs and Logging—Failure to Find on Material Issues in Vendor's Action for Price of Timber held Error.

1. In action by vendor of standing timber for balance of purchase price against purchaser who had not removed all of the timber during the period provided therefor by the contract, where purchaser's allegation that by subsequent agreement the timber on part of the tract was eliminated from the original contract, and that on account of notice from vendor purchaser had suspended operations for certain period during life of contract were denied by vendor, court's failure to make finding on the issues so raised held material error. (Kee v. Carver, 406.)

Logs and Logging—Timber Contract Conveys Title Subject to be Defeated on Grantee's Failure to Remove Timber Within Specified Time.

2. Contract of sale of standing timber operates to convey the present title to the timber, but the estate thus created is upon condition liable to be defeated on grantee's failure to remove timber within time specified. (Kee v. Carver, 406.)

Logs and Logging—Purchaser of Standing Timber cannot Recover Price Paid upon Failure to Remove Timber Within Required Time.

3. Purchaser of standing timber for a cash consideration under agreement to remove within specified time cannot recover money paid, upon his title to the timber being defeated by his failure to remove the timber within the time specified therefor. (Kee v. Carver, 406.)

Logs and Logging—Vendor not Entitled to Balance of Purchase Price for Timber not Removed Within Specified Period Where not Out and Manufactured into Cordwood for Purpose of Ascertaining Price as Required by Contract.

4. Where the purchase price for standing timber was to be ascertained by the actual cutting of the timber and the manufacturing

thereof into cordwood which was to be measured as a basis for computation of the amount to be paid, vendor upon purchaser's failure to remove all of the timber within specified time could not recover balance of purchase price for amount not removed where such timber had not been cut and manufactured into cordwood, since vendor, relying on provision of contract requiring removal by certain date, is bound by other provision thereof as to ascertainment of price. (*Kee v. Carver*, 406.)

Logs and Logging—Vendor Required to Show Damages Suffered in Action for Purchaser's Failure to Remove Standing Timber Within Specified Period.

5. Vendor of standing timber cannot recover damages on purchaser's failure to cut and remove timber within specified period where price cannot be computed because dependent upon amount of cordwood into which timber can be manufactured, in the absence of a showing that he has suffered damages by purchaser's breach. (*Kee v. Carver*, 406.)

Logs and Logging—Vendor cannot Claim Full Contract Price as Measure of Damages for Purchaser's Failure to Remove Timber Within Specified Period and Keep Title to Timber.

6. Vendor of standing timber cannot, on purchaser's failure to remove a part of the timber within the specified period, claim the full contract price as a measure of damages for purchaser's breach in absence of showing of other damage sustained, and keep the title to the timber which reverted to him by the expiration of the period within which it was to be removed. (*Kee v. Carver*, 406.)

Logs and Logging—Complaint Insufficient to Show Damages to Vendor of Standing Timber Because of Purchaser's Failure to Remove Within Required Time.

7. In action by a vendor of standing timber against purchaser who failed to remove all of the timber within specified period, complaint alleging that vendor entered into an agreement to convey to third party the land upon which the standing timber remained, without alleging that conveyance was actually made or that third party had performed contract entitling him to conveyance, held insufficient pleading of damages sustained by vendor because of purchaser's failure to remove timber within required period. (*Kee v. Carver*, 406.)

Logs and Logging—Standing Timber Goes With General Title to Land Upon Expiration of Period of Time Provided for Removal.

8. Where purchaser of standing timber fails to remove a portion of the timber within the required time, the standing timber goes with the general title to the land after expiration of the period provided for removal. (*Kee v. Carver*, 406.)

MANDAMUS.

Mandamus—Pleading Conditions Precedent Necessary to Compel Issue of Charter to do Banking Business.

1. In the absence of allegation by petitioner that the superintendent of banks has examined into the condition of a proposed bank and has ascertained the character and general fitness of the persons

named as officers and stockholders, or has refused to do so, *mandamus* will not lie to compel him to grant a charter, in view of Section 4568, L. O. L., as amended by Laws of 1917, page 154, Section 2, (Mulkey v. Bennett, 70.)

Mandamus—Demurrer not Admission of Facts not Alleged.

2. While a demurrer admits all of the allegations of an alternative writ of *mandamus*, it cannot be deemed or treated as an admission of any fact which is not alleged. (Mulkey v. Bennett, 70.)

Mandamus—Sale of Bonds to Equal Federal Aid for Highways Discretionary With State Board of Control, and not to be Compelled.

3. Under Act Jan. 20, 1920, providing that state board of control is "authorized, empowered in its discretion" to sell bonds to enable the state to match federal aid for highways available under the Shakelford Bill and under federal act of February 28, 1919, court will not by *mandamus* compel the board to sell the bonds, at least in absence of allegations of special facts, the selling of the bonds being discretionary with the board. (Benson v. Okeott, 249.)

See Appeal and Error, 40.

MASTER AND SERVANT.

Master and Servant—Proof of Reasonable Value of Services Admissible Under Complaint.

1. A complaint alleging that, at the request of defendant, plaintiff performed services for the sum of \$60 per month and her board, the reasonable value thereof, which sum and board defendant agreed to furnish and pay, states a cause of action for the reasonable value of the services, permitting proof of such value, and is not founded upon an express contract. (Miller v. Howard, 426.)

Master and Servant—Compensation Act not Applicable to Municipality; "Employer."

2. A municipality was not an employer within the Workmen's Compensation Act in force December 23, 1916. (Hornig v. Canby, 612.)

Master and Servant—Evidence Held Sufficient to Take Question of Employment to Jury.

3. Minutes of a council meeting, appointing plaintiff's son as waterworks engineer, and oral testimony that it was agreed at the meeting that the son might employ plaintiff in his place when absent, held sufficient to take to the jury the question whether or not plaintiff was an employee of the town when injured. (Hornig v. Canby, 612.)

Master and Servant—Finding of Negligence Held Warranted.

4. Where plaintiff was injured by his clothing catching on the key which fastened the fly-wheel to its shaft near the pulley he was adjusting, the jury could find the employer negligent in violating the Employers' Liability Act, which required it to use every care and precaution which might have been used without impairing the efficiency of the machinery to protect employee from injury. (Hornig v. Canby, 612.)

MAXIMS.

When not Necessary to Offer to Do Equity.

See Cancellation of Instruments, 1.

MEASURE OF DAMAGES.

See Logs and Logging, 6, 7.

MODIFICATION.

See Appeal and Error, 16.

See Divorce, 12, 17.

Of Decree Changing Custody of Children.

See Divorce, 8.

MONUMENTS.

Will Control Courses and Distances.

See Boundaries, 2.

MORTGAGES.

Mortgages—Foreclosure—Defendant has Burden of Proving Counter-claim for Fraud.

1. In action to foreclose purchase-money mortgage, in which defendants counterclaimed damages for false representations, the burden of proving fraud and damages was upon defendants. (*Parks v. Smith*, 300.)

Mortgages—Amount of Attorney's Fees Governed by Laws of State in Which Suit is Brought.

2. Oregon court, in foreclosing mortgage securing note providing for an additional 10 per cent as attorney's fees, will not allow a reasonable amount for attorney's fees pursuant to California law, though note was executed in California, notwithstanding Section 5835, L. O. L.; attorney's fees being a matter of procedure. (*Parks v. Smith*, 300.)

Mortgages—No Reasonable Attorney's Fee Allowed Under Provision of Note Providing for a Fixed Amount.

3. Where parties stipulate in a note for the fixed amount to be allowed as attorney's fee in case of suit, whether much or little is done in such suit, the court will not make a new contract for such parties and adjudicate a reasonable amount for the services of the attorney nor allow any attorney's fee except the statutory costs. (*Parks v. Smith*, 300.)

Mortgages—Agreement to Pay Reasonable Attorney's Fee Valid.

4. An agreement by a debtor to pay such sum as the court may adjudge reasonable as attorney's fees in case of suit or action to enforce payment is valid. (*Parks v. Smith*, 300.)

Mortgages—Failure to Make Agent a Party in Foreclosure not Fatal, Where Principal is a Party.

5. In mortgage foreclosure suit, an agent of a party known by defendant to be an agent need not be made a party, as principal is real party in interest. (*Jubitz v. Gress*, 332.)

Mortgages—Want of Consideration must be Plead.

6. Want of consideration to be a defense to action on note and to foreclose mortgage must be pleaded. (*Jubitz v. Gress*, 332.)

Mortgages—By Mother-in-law of Lessee to Secure Performance of Lease Supported by Sufficient Consideration.

7. Mortgage, given by mother-in-law of a lessee of hotel to secure performance of lease in consideration of the leasing of the hotel and the transfer of the liquor license to lessees, was supported by sufficient consideration. (*Jubitz v. Gress*, 332.)

Mortgages—Single Money Decree Could not be Given in Proceedings to Foreclose First and Second Mortgages in Single Proceeding.

8. Conceding that first mortgage given by four persons could be foreclosed in same proceeding with second mortgages given by two of the four, a single money decree could not be given. (*Chandler Inv. Co. v. Matlock Inv. Co.*, 394.)

Mortgages—Bidding at Sale not Chilled by Statement of One Interested That Bidders of Property of One Defendant Would Take Subject to Second Mortgage.

9. Where M. and L. gave to an investment company a first mortgage on property of each, and thereafter M. gave to company a second mortgage on his property and a bank bought all the interest of L. with knowledge of second mortgage, it was not a valid objection, on ground of chilling bidding, to confirmation of sale on foreclosure of first mortgage that representative of company stated that bidders of property of M. would take "subject" to second mortgage, since, notwithstanding Section 423, L. O. L., failure to make junior encumbrancer a party does not invalidate decree, though foreclosure of first lien does not bar equity of redemption. (*Chandler Inv. Co. v. Matlock Inv. Co.*, 394.)

Mortgages—Burden is on Plaintiff Suing to have It Adjudged That Deed was Mortgage and had Been Paid.

10. In a suit to have it decreed that a deed constitutes a mortgage and has been paid, and that plaintiff is the owner and entitled to the possession of the property, the burden is on him to establish the affirmative allegations of his complaint, especially the allegation of payment. (*Hurst v. Hurst*, 563.)

Mortgages—Mortgagee Who had Never Been Repaid and had Purchased from Assignee for Creditors will be Treated in Equity as Owner.

11. Where members of a partnership executed a deed as security for the payment of money borrowed, taking a bond for title, and a new firm, their successors in interest, made an assignment for the benefit of creditors, and the holder of the security deed purchased the property from the assignee and was never paid the amount borrowed from her, she will be considered in equity as the owner. (*Hurst v. Hurst*, 563.)

See Municipal Corporations, 11.

Pleading in Mortgage Foreclosure Suit Construed.

See Action, 1.

Cancellation of Note and Mortgage Obtained Through Collusive Divorce Agreement.

See Cancellation of Instruments, 2, 3.

MOTION.**To Strike and to Make More Definite and Certain.**

See Pleading, 8.

Waived by Pleading Over.

See Pleading, 9.

For Nonsuit in Effect a Demurrer to Evidence.

See Trial, 8.

MOTOR TRUCK.**Drawing Conclusion from Admitted Facts is not the Decision of an Issue of Facts.**

See Appeal and Error, 39.

Duty of Driver at Crossing Defined.

See Railroads, 1-4.

MUNICIPAL CORPORATIONS.**Municipal Corporations—Completion of Municipal Improvement According to Advertised Plan not Within Scope of Writ of Review.**

1. In an action to recover assessments for a street improvement whether the work was completed according to the advertised plan is a question of fact, into which the Supreme Court cannot inquire on a writ of review; the official city declaration being conclusive. (Ukase Inv. Co. v. Portland, 176.)

Municipal Corporations—Local Improvement Assessments may be Repeated Until Property Benefited has Paid Just Proportion of Expense.

2. If a city has undertaken an improvement within the scope of its powers, and has actually accomplished it before an assessment therefor has been found to be irregular, the municipality may return again and again to the assessment until the property benefited is finally required to pay its just proportion of the expense. (Ukase Inv. Co. v. Portland, 176.)

Municipal Corporations—Authority of City to Pave Street and Assess Special Benefits.

3. In view of Ashland City Charter (Laws 1898, p. 100), Article XVII, Section 1, excepting the territory of the city from the jurisdiction of the County Court of Jackson County for road purposes, and Article VII, Section 1, subdivision 2, giving the council power to levy special benefit assessments for road improvements, and Article I, Section 1, giving the city powers possessed by municipal corporations under state laws, and Article XV, Section 2, authorizing the council to pave streets and levy special benefit assessments therefor, and Article VII, Section 1, subdivision 10, authorizing council to super-

vise public highways and streets, the city had power to pave a street and levy a benefit assessment upon adjacent property as against the objection that such street is a county highway. (*Patterson v. Ashland*, 233.)

Municipal Corporations—Estoppel to Object to Validity of Assessment by Waiver of All Defects by Agreement for Payment by Installments.

4. In a suit to set aside a special benefit assessment for street paving, on the ground that the city was without authority to pave the street because it was a county highway, plaintiff having applied for the right to pay such tax by installments under Bancroft Act, Section 1 (Section 3245, L. O. L.), and in her agreement with the city waived "all irregularities or defects, jurisdictional, or otherwise, in the proceedings to construct said pavement," became estopped to assert her claim of the city's lack of authority. (*Patterson v. Ashland*, 233.)

Municipal Corporations—Decree Enjoining Collection of Assessment for Street Improvement Does not Bar Reassessment.

5. A decree invalidating assessment for street paving because the city could not levy an assessment until work was completed does not bar the city from levying and collecting an assessment after completion of the improvement, for otherwise the provisions of Charter of Portland 1903, Section 400, retained as an ordinance under the present Initiative Charter, Section 284, and relating to reassessments where assessments are held invalid, would be meaningless. (*Gardner v. Portland*, 378.)

Municipal Corporations—Allegation by Single Owner That Improvement Would have Been Defeated by Remonstrances Insufficient Since It Requires Owners of 60 Per Cent of Affected Property Therefor.

6. Where a city declared its intention to pave a street at grade, and so made the improvement, except that a viaduct was built over railroad tracks by railroads and street pavement made thereon, an allegation by single owner that the improvement was abandoned and would not have been consented to, but would have been defeated by remonstrances, is ineffectual, since under Charter of Portland, Section 284, the owners of 60 per cent of the affected property are required to defeat an improvement. (*Gardner v. Portland*, 378.)

Municipal Corporations—City's Right to Assess Benefitted Property for Street Paving not Lost Where It in Good Faith Altered Grade.

7. Where a city declared its intention to pave a street at its established grade and in good faith permitted railroad companies to build a viaduct on street over their tracks at their expense for safer crossings, thus changing part of street grade, to which property owners did not object, the city, particularly in view of Charter of Portland, Section 265, is entitled to make and collect a fair assessment therefor from the benefitted property where the alteration of the grade imposed no additional servitude. (*Gardner v. Portland*, 378.)

Municipal Corporations—Statutes—The Word "Provided" Construed—Public Highways Within City Subject to Improvement by City.

8. The usual office of the word "provided" in a statute is to create a condition or to restrain the enacting clause, to except

something which would otherwise be in it, or in some manner modify it, but, under Laws of 1899, page 472, Charter of City of Monmouth, Section 29, authorizing the common council to lay out, establish, vacate, and open streets, "provided that all public highways and roads within the corporate limits of said city become streets," a highway within such limits became a street, "provided" having been inartistically used as a conjunction, despite Laws of 1917, page 78, expressly giving the city jurisdiction over such highway by name. (*Griffa v. Monmouth*, 433.)

Municipal Corporations—Contractor Required to "Promptly" Make Payments to Pay Bills at Maturity.

9. Under Section 6266, L. O. L., requiring contractors on public contracts to "promptly" pay materialmen, a contractor's surety was obligated to pay such bills at their maturity. (*City of Pendleton v. Jeffery & Bufton*, 447.)

Municipal Corporations—Action for Account Stated may be Maintained Against Contractor's Surety.

10. Under Section 6266, L. O. L., giving a municipality a right of action for the benefit of a materialman against a contractor and his sureties, the fact that complaint alleges an account stated between the contractor and materialman is not objectionable, where such account was merely an agreement as to the amount due for materials. (*City of Pendleton v. Jeffery & Bufton*, 447.)

Municipal Corporations—Materialman's Efforts to Collect Debt did not Release Contractor's Surety.

11. A materialman's efforts to collect the amount due from the contractor by prosecuting the contractor's claim against the owner, foreclosing a mortgage assigned to it by the contractor, etc., held not to release the contractor's surety from liability under Section 6266, L. O. L., for the remaining balance, where it had been kept informed of the materialman's efforts to collect the debt. (*City of Pendleton v. Jeffery & Bufton*, 447.)

Municipal Corporations—Statute Prohibiting a Municipal Corporation from Imposing License Taxes on Insurance Agents No Invasion of Field of Municipal Legislation.

12. Laws of 1917, page 321, Section 3d, subdivision 6, prohibiting cities from imposing a license tax on insurance agents, does not contravene Article XI, Section 2, of the Constitution, prohibiting the legislature from entering into the field of municipal legislation. (*Lovejoy v. Portland*, 459.)

Municipal Corporations—Legislature not Prohibited by Constitution from Enacting General Laws Concerning Municipal Corporations.

13. The legislature is not prohibited by Article XI, Section 2, of the Constitution, from enacting general laws concerning cities and towns. (*Lovejoy v. Portland*, 459.)

Municipal Corporations—Abutting Owner Liable to Assessment for Curbing, Though Other Curbing Previously Existed.

14. Where a municipality through proper procedure directed the paving of a street at a given width, there was a manifest intention to have a uniform curbing, that is, one adjoining the paved way,

and plaintiff, an abutting property owner, cannot escape liability for curbing because one of his predecessors had constructed a sidewalk and curb in front of the premises; such curbing having been constructed on the theory that the street would have a considerably greater width than that at which it was paved. (Haner v. Eugene, 596.)

Municipal Corporations—Plans Made Part of Paving Notice by Reference.

15. Reference to plans in notice of paving *held* to make plans part of notice as effectually as if they had been copied therein. (Haner v. Eugene, 596.)

Municipal Corporations—Publication of Improvement Notice Binding on Property Owner.

16. Where there was no irregularity in the publication of notices and an ordinance directing paving, such notice is binding on a property owner, though he had no actual knowledge. (Haner v. Eugene, 596.)

Municipal Corporations—Existence of Old Curb not Conforming to New Plan Held not Defense to Assessment, Including New Curb.

17. In a suit to cancel a special street paving and curbing assessment, the fact that a curb had previously been constructed in front of plaintiff's premises by plaintiff's predecessor in accordance with an alleged plan authorized by the city, constituted no defense, where under the contemplated improvement such curb would not be in line with the new curb; there being nothing to show that the city had authorized its construction, or the order of the city engineer under which it was constructed. (Haner v. Eugene, 596.)

Municipal Corporations—Encroachment of Retaining Wall Held not to Invalidate Entire Assessment.

18. In a suit to cancel a street paving assessment, that a retaining wall to some extent encroached on private property thus increasing the expense of the improvement, did not constitute a ground for declaring the whole improvement invalid, although the objecting taxpayer would be entitled to an abatement of so much of his assessment as went into that part of the structure which extended beyond the exterior boundaries of the street, particularly where such reduction was not the object of the suit. (Haner v. Eugene, 596.)

Municipal Corporations—Ordinance Unnecessary for Hiring Employee.

19. A charter provision, relieving a town from liability on a contract not authorized by city ordinance and made in writing, applies only to contracts for work to be let after notice, and does not require an ordinance for a contract authorizing the engineer of the town waterworks to employ his father in his absence. (Hornig v. Canby, 612.)

See Eminent Domain, 1.

See Highways, 1.

Parol Evidence can Add to Municipal Contract of Hiring of Municipal Employee.

See Evidence, 10.

Municipality not an Employer Within the Workmen's Compensation Act.

See Master and Servant, 2.

MUTUAL RESOISSION.

See Appeal and Error, 19.

See Evidence, 6.

See Pleading, 4.

See Vendor and Purchaser, 1-13.

NEGLIGENCE

Negligence—Contributory Negligence Question for Court When Only One Conclusion Possible from Evidence.

1. If there can be no reasonable conclusion other than that plaintiff himself was remiss in his duty at the time of the accident, it is incumbent on the court to so declare and order nonsuit. (Olds v. Hines, 580.)

Finding of Negligence Held Warranted.

See Master and Servant, 4.

NEWSPAPER.

Newspapers—Publication Affidavit Sufficient, Though Merely Alleging Newspaper was One of General Circulation.

1. An affidavit, setting forth publication of notice of an election to issue bonds of an irrigation district, which was in the form used under Section 58, L. O. L., prior to the enactment of Laws of 1917, page 461, defining the term "newspaper" and declaring that it shall apply only to papers containing certain amount of printed matter, and having a specified number of subscribers, is sufficient, though it merely alleged that the newspaper was one of general circulation. (Gard v. Henderson, 520.)

NEW TRIAL.

Assignments of Error in Denying Insufficient.

See Appeal and Error, 12.

NOTICE

See Adverse Possession, 4.

See Appeal and Error, 1, 8, 17, 18.

See Exceptions, Bill of, 1.

See Municipal Corporations, 15, 16.

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See Divorce, 5.

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To Devise Land to Employees, When not Enforceable.
See Specific Performance, 2.

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No Presumption of Knowledge of Ordinances, Except in Municipal Courts.
See Evidence, 1.

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Is Inadmissible to Explain Indorsement of Note Without Recourse.
See Evidence, 9.

Can Add to Minutes of Contract of Hiring of Municipal Employee.
See Evidence, 10.

PARTIES.

Parties—Error in Substitution of Sheriff's Successor as Defendant Waived by Answering and Seeking Affirmative Relief.

1. In a replevin action brought against the sheriff, an order of substitution of the sheriff's successor in office as defendant if erroneous was waived by defendant by answering and seeking affirmative relief. (Utah-Idaho Sugar Co. v. Lewis, 224.)

Failure to Make Agent a Party in Foreclosure not Fatal Where Principal is a Party.
See Mortgages, 5.

PARTNERSHIP.

Partnership—New Member of Firm Held to Acquire Interest in Land Treated as Partnership Property.

1. Where real estate was purchased by members of a partnership and used for partnership purposes only, and was considered as partnership property, and when one of them was succeeded by a new member of the firm both the old parties represented to him that the property was partnership property, and it was dealt with in such transaction as such property, the intention of the parties will govern, and the new partner acquired a one-half interest in the land. (*Hurst v. Hurst*, 563.)

See Joint Adventures, 1-3.

See Mortgages, 11.

Deed Between Partners Conveying All of Government Lot by Number Originally Surveyed.

See Deeds, 1.

Conveyance of Property by Name Known to and Used by Parties Valid.

See Deeds, 2.

PATENTS.

Patents—Agreement to Give Right to Sell on Terms to be Agreed on not a Contract.

1. An agreement to give right to dispose of patented article, the terms and conditions to be agreed on later by the parties, but to be in the "bounds of reason and on about the same basis as has been customary in similar deals before, by other people," does not amount to a contract; the minds of the parties not meeting on any specific proposition. (*Beall v. Foster*, 39.)

PERSONAL INJURIES.

See Counties, 1.

See Highways, 2-5.

See Railroads, 1-4.

PLEADING.

Pleading—Admissions—Cancellation of Note Executed Pursuant to Collusive Agreement.

1. In divorced wife's action to cancel her note and mortgage to husband upon ground that they were void and without consideration, because executed pursuant to collusive divorce agreement, husband, after asserting validity of agreement and after alleging that in reliance thereon he did not appear or defend divorce suit though he had a valid defense, cannot question court's jurisdiction to render decree of cancellation upon ground that parties are *in pari delicto*. (*Hodler v. Hodler*, 180.)

Pleading—Answer may Aid Complaint as Against Demurrer.

2. In a replevin action against a sheriff, wherein the sheriff demurred, and the sheriff's successor in office was substituted as defend-

ant, although the complaint was not amended, the substituted defendant by voluntarily answering and supplying all the allegations lacking in the complaint thereby made the complaint good. (Utah-Idaho Sugar Co. v. Lewis, 224.)

Pleading—Amendment Changing Action from Trespass to Contract Properly Allowed.

3. Plaintiff, a land owner, who sued a contractor and a drainage district on the ground that, in construction of the ditch in part over plaintiff's land, earth excavated was thrown on the land of another, *held*, in view of Section 102, L. O. L., properly allowed to file an amended complaint more fully setting forth the facts, despite the claim that the first complaint was one in trespass, and the second for breach of contract; each complaint showing the same facts. (Arstill v. Fletcher, 308.)

Pleading—Defect in Complaint of Purchaser Suing for Payment Cured by Answer.

4. In purchaser's action to recover payment on ground of mutual rescission of contract, failure of plaintiff to allege that a default on payment at specified time had been waived was cured by defendant's answer showing that payment had been accepted, and therefore that default had been waived. (Cornely v. Campbell, 345.)

Pleading—Hypothetical Allegations Do not Present Issuable, Material Fact.

5. The allegation in a complaint of what would or would not have been done is hypothetical, and does not constitute issuable fact, and is immaterial. (Gardner v. Portland, 378.)

Pleading—Allegations in Complaint to be Liberally Construed Where not Objected to.

6. Where it was doubtful whether a plaintiff stated a cause of action for the reasonable value of services or on a contract to pay a given sum for stated work, and it was not objected to, it should be construed in favor of whichever theory was supported by the testimony. (Miller v. Howard, 426.)

Pleading—Answer Held not Admission That Note was Indorsed Without Recourse.

7. Where defendant alleged that as trustee he transferred the note sued on without recourse to himself, *held* that such averment in the answer was not an admission that the note was indorsed without recourse. (Smith v. Barner, 486.)

Pleading—Complaint Held Sufficient as Against Motions to Strike and to Make More Definite.

8. In action against a school district to enforce payment on contract to furnish transportation to pupils under Section 4055, L. O. L., complaint, alleging that by a majority vote of the district's legal electors defendant was authorized to furnish transportation to certain pupils, pursuant to which authorization defendant contracted with plaintiff for the transportation, *held* not subject to motion to strike out or make more definite by setting forth the date of the alleged meeting of the electors, as plaintiff could not impart any

knowledge in that respect which defendant did not have. (Crane v. School District No. 14, 644.)

Pleading—Motion to Strike or Make Definite Waived by Pleading Over.

9. An objection to denial of motion to strike or to make the complaint more definite and certain is waived by pleading over. (Crane v. School District No. 14, 644.)

Pleading—Demurrer to Answer Its Truth.

10. Demurrer to an answer admits all the allegations thereof are true. (Crane v. School District No. 14, 644.)

See Constitutional Law, 1.

See Mandamus, 1, 2.

See Master and Servant, 1.

See Trespass, 2.

Pleading in Mortgage Foreclosure Suit Construed.

See Action, 1.

Recovery must be Based on Allegations of Complaint.

See Judgment, 2.

An Allegation by Single Owner That Street Improvement Would have Been Defeated by Remonstrance, Insufficient.

See Municipal Corporations, 6.

Held to State Cause of Action for Breach of Contract of Employment to Transport Pupils.

See Schools and School Districts, 5.

Finding in Action on Transportation Contract Warranted by Pleading.

See Schools and School Districts, 6.

Answer in Action on Transportation Contract Alleging Closing of Schools Held Insufficient.

See Schools and School Districts, 9, 10.

Findings must Dispose of All Issues Raised by Pleadings.

See Trial, 2.

To Recover Payment on Land Contract Complaint Held to Allege Mutual Rescission.

See Vendor and Purchaser, 11.

PORTLAND, CHARTER OF.

See Gardner v. Portland, 373.

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Of Ownership Arising from Brands Stated.

See Animals, 1, 2.

That Incompetent and Immaterial Evidence has Been Disregarded by Trial Court Sitting Without Jury.

See Appeal and Error, 4.

There is No Presumption of Error.

See Appeal and Error, 31.

That Statute is Constitutional and That It Embraces but One Subject.

See Constitutional Law, 2.

No Presumption of Knowledge of City Ordinances.

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That Material is to be Paid for on Delivery.

See Sales, 1.

PREVAILING PARTY.

See Appeal and Error, 16.

PRINCIPAL AND AGENT.

Principal and Agent—Agent may not Make Secret Profit.

1. An agent who makes a secret profit in the execution of his trust as such agent may be compelled to account to his principal. (Thimsen v. Reigard, 45.)

Principal and Agent—Knowledge Acquired by Agent in Prior Transaction Knowledge of Principal.

2. The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent in the particular transaction, provided it be of such character as he may communicate to his principal without breach of professional confidence. (Thimsen v. Reigard, 45.)

Principal and Agent—Party Informed That Settlement Agreement Requires Principal's Approval cannot Assume That Agency is General.

3. Where an automobile manufacturer's agent, in negotiating a settlement of the business affairs of such manufacturer and a local dealer, informed the dealer that any settlement would have to be taken up with the home office, the dealer was in no position to assume that his agency was general. (Wentworth v. Winton Co., 541.)

Failure to Make Agent a Party in Foreclosure not Fatal Where Principal is a Party.

See Mortgages, 5.

PRINCIPAL AND SURETY.**Principal and Surety—Contractor's Surety Liable for Interest.**

1. Under Section 6266, L. O. L., requiring contractors to promptly pay materialmen, and Section 6028, fixing the interest rate upon balances due on matured accounts, a contractor's surety is liable for interest on amounts due the materialmen between the date material was furnished and the date the materialmen and contractor agreed upon the balance due. (*City of Pondleton v. Jeffery & Bufton*, 447.)

PRIVATE ROADS.**Private Roads—Neither County Court nor Members Thereof Proper Parties to Writ of Review Directed to County Court.**

1. In a petition for a writ of review to be directed to the County Court relative to the establishment of a road of public easement for the benefit of privately owned land, neither the County Court as a judicial tribunal nor the individuals who as officers compose such court were proper parties. (*Holland-Washington Mortgage Co. v. County Court of Hood River County*, 668.)

Private Roads—County is Made Defendant by Operation of Law in Petition for Writ of Review Relative to Establishment of Private Road.

2. A petition for a writ of review to be directed to County Court in a proceeding relative to the establishment of a road of public easement for the benefit of adjoining lands need not expressly make the county a party, since the county is a defendant by operation of law, being responsible for acts occurring upon road under Section 6375, L. O. L. (*Holland-Washington Mortgage Co. v. County Court of Hood River County*, 668.)

PROCESS.**County Clerk may Admit Service of Writ of Review for County.**

See Writ of Review, 7.

PROFIT.**Member may not Make Secret Profit.**

See Joint Adventures, 2.

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PROXIMATE CAUSE.

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Of Improvement Notice Binding on Property Owner.

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Publication Affidavit Sufficient, Though Merely Alleging Newspaper was One of General Circulation.

See Newspapers, 1.

Affidavit of Publication Sufficient, Though Failing to State Amount of Publication Charge.

See Waters and Watercourses, 2.

SCHOOLS AND SCHOOL DISTRICTS.**Schools and School Districts—Bonds Incontestable After Execution, Registration, and Delivery to Purchaser.**

1. Under Laws of 1913, page 299, legality of school district bonds executed, registered and delivered to purchaser as there provided after an election for their issuance, are incontestable, in the absence of fraud or some fatal defect in the proceedings, known to the purchaser at or before purchase. (Pullen v. School District No. 3, 289.)

Schools and School Districts—Contest of Bond Issue Election not Provided for.

2. Contests of election are authorized by statute only as between nominees claiming election to an office, and are not provided as such respecting elections about measures submitted to the people, as an issuance of bonds by a school district. (Pullen v. School District No. 3, 289.)

Schools and School Districts—No Contest of School District Bond Issue Election in Absence of Statutory Authority.

3. In the absence of statute permitting contest of an election whereby school district bonds were authorized, the Supreme Court cannot admit the legitimacy of contestants' complaint, and the question of whether or not certain voters were authorized to vote is not available to contestants; the decision of the election tribunal created by Laws of 1913, Chapter 172, Section 2, to decide such matters being final in the absence of fraud. (Pullen v. School District No. 3, 289.)

Schools and School Districts—Determination of Judges of Bond Issue Election as to Validity Conclusive on Collateral Attack.

4. Where judges and a clerk were properly chosen pursuant to Laws of 1913, Chapter 172, Section 2, to officiate at a school district bond issue election, a determination of such tribunal as to the validity of the election in the absence of fraud must stand as against collateral attack in the absence of any statute affording right of contest, appeal or other review of the decision. (Pullen v. School District No. 3, 289.)

Schools and School Districts—Complaint Held to State Cause of Action for Breach of Contract of Employment to Transport Pupils.

5. In action against a school district to enforce payment on contract to furnish transportation to pupils under Section 4055, L. O. L., complaint, alleging plaintiff was employed "to transport the pupils of defendant district * * for a term of nine school months beginning" on a certain date, stated a cause of action, although there was no specific averment that the employment was continuous from that date. (Crane v. School District No. 14, 644.)

Schools and School Districts—Findings in Action on Transportation Contract Warranted by Pleadings.

6. In action against a school district to enforce a payment on contract to furnish transportation to pupils under Section 4055, L. O. L., findings of fact that the contract was authorized by the legal voters and was executed as alleged in the complaint held warranted, although

the complaint did not allege that such voters authorized the contract's execution for any specific length of time, for in the circumstances the current year of nine months would be a reasonable time, and must have been the period contemplated by the voters. (Crane v. School District No. 14, 644.)

Schools and School Districts—Power of State Board of Health to “Quarantine” Does not Include Authority to Close Public Schools.

7. Neither the power of “general supervision of the interests of the health and life” of citizens, nor the power to make and enforce quarantine regulations, given by Section 4687, L. O. L., to the state board of health, embraces authority to close public schools, as to prevent spread of influenza epidemic, in view of Laws of 1913, Chapter 172, Section 1, subdivision 9. (Crane v. School District No. 14, 644.)

Schools and School Districts—School Boards have Discretion to Close Schools on Account of Epidemic.

8. Under Laws of 1913, Chapter 172, Section 1, subdivision 9, providing that school boards shall have entire control of the public schools of their districts, the closing of the schools for any reason, as to prevent the spreading of influenza epidemic, rests in the sound discretion of the school board, and is therefore not a question of law. (Crane v. School District No. 14, 644.)

Schools and School Districts—Answer in Suit on Transportation Contract Alleging Closing of Schools Held Insufficient.

9. In action against a school district to enforce payment on contract to furnish transportation to pupils under Section 4055, L. O. L., answer was insufficient on which to base defense of impossibility of contract's performance by operation of law, where it specifically alleged that the school sued was closed in obedience to the order of the health officer, and not otherwise; such officer having no such power. (Crane v. School District No. 14, 644.)

Schools and School Districts—Contract to Transport Pupils not Necessarily Suspended by Closing School.

10. Closing of school would not necessarily suspend contract for transporting pupils during the school term, under Section 4055, L. O. L., where the contract contained no provisos or exceptions, and no order was made by anyone in any manner prohibiting the carrying out of its terms. (Crane v. School District No. 14, 644.)

SPECIAL BENEFITS.

See Municipal Corporations, 3, 4.

SPECIFIC PERFORMANCE.

Specific Performance—Oral Lease for More Than One Year Specifically Enforced Because of Improvements by Tenant.

1. A court of equity will require specific performance of an oral lease for a term of more than one year, and therefore void under the statute of frauds, where the tenant has entered into the premises and has incurred expense in making valuable permanent improvements and changed his position to such an extent that a refusal on the part of

the lessor to perform operates as a fraud on the rights of the lessee. (Frieborg v. Bjelland, 320.)

Specific Performance—Oral Contract to Devise Land to Employees not Enforceable in Absence of Showing of Change in Character of Possession.

2. Decedent's oral contract to devise to his employees certain land not specifically described, on which he and the employees were living, it being uncertain whether the land was to be devised to the employees or to them and their children, *held* not specifically enforceable against decedent's administrator and his heir, in the absence of showing there was any change in possession by employees as such to possession as purchasers or prospective devisees. (Riggs v. Adkins, 414.)

STATE BOARD OF HEALTH.

Power to Quarantine Does not Include Authority to Close Public Schools.

See Schools and School Districts, 7.

STATE HIGHWAY COMMISSION.

No Authority to Sell Bonds to Equal Federal Act of February 28, 1919.

See States, 3.

STATES.

States—State Board of Control not Authorized to Sell Bonds to Meet Federal Aid for Highways Offered by Act of 1919.

1. Under Laws of 1917, Chapter 175, Section 2; *Id.*, Chapter 194, Section 38; *Id.*, Chapter 237; *Id.*, Chapter 423, Sections 3, 5-8, 10-12; Laws of 1919, Chapter 159; *Id.*, Chapter 173, Sections 1, 4, 8, 12, 15; *Id.*, Chapter 399, Section 37, and *Id.*, Chapter 403, the state had no authority to sell bonds to equal in amount the federal aid for highways offered under Act Cong. Feb. 28, 1919. (Benson v. Olcott, 249.)

States—Authority to Sell Bonds must be Given by Clear Language.

2. No officer or board should be adjudged to possess authority to sell bonds obligating the state to pay millions of dollars unless such authority is conferred in clear and express language. (Benson v. Olcott, 249.)

States—No Authority in State Highway Commission to Sell Bonds to Equal Federal Aid.

3. Under Act Jan. 20, 1920, providing that state board of control is "authorized, empowered in its discretion" to sell bonds to enable the state to match federal aid for highways available and under the Shakerford Bill and under federal act of February 28, 1919, the state highway commission has no authority to sell bonds to meet such federal aid; such authority, even if given by Laws of 1919, page 241, having been withdrawn by act of 1920. (Benson v. Olcott, 249.)

STATUTE OF FRAUDS.

Frauds, Statute of—Lessee may not Claim Possession to be Under Oral Contract to Purchase.

1. One who entered a parcel of land under a contract for a deed and at the same time received a written option to purchase a near-

by tract, the option being a separate writing, and entered the second tract under a verbal lease the first year, giving the grantor one third of the crops, and under written leases for subsequent years, he cannot maintain that the contract for deed, and the written option constituted but one transaction, for the purpose of conveying to him the combined tracts at an agreed consideration, and that he was in possession of the second tract under an oral contract to purchase. (*Miller v. Binahadler*, 24.)

Frauds, Statute of—Possession Taking Oral Contract to Convey Land Out of the Statute.

2. To take an oral contract to convey land out of the statute of frauds, the necessary possession must have been taken by the purchasers under and in pursuance of the contract, and it is not enough that they were already on the land by virtue of some other arrangement with the seller, as that of his employees, but there must have been such an open and notorious change to the status of purchasers in possession as to have attracted the notice of other people. (*Riggs v. Adkins*, 414.)

Oral Lease for More Than One Year may be Specifically Enforced.

See Specific Performance, 1.

STATUTES.

Statutes—Title not Sufficient to Authorize Issuance of Bonds to Meet State Aid.

1. Laws of 1917, page 221, entitled "An act to accept the benefits of" Act Cong. July 11, 1916 (U. S. Comp. Stats., §§ 7477a-7477i), the Shakerford Bill providing for federal aid to states in construction of rural post roads, "and to provide for issuance of bonds * * to meet requirements of said federal statute," etc., *held* not to authorize issuance of additional bonds to equal the aid given by Act Cong. Feb. 28, 1919, notwithstanding Section 2 of the state statute, providing that such statute should cover "any other aid hereafter furnished by the United States," since to give effect to quoted words would violate Article IV, Section 20, of the Constitution, requiring an act to embrace but one subject, to be expressed in title. (*Benson v. Olcott*, 249.)

Statutes—When Amendment of Adopted Statute Does not Affect Adopting Statute.

2. The amendment of an adopted statute does not, as between the adopting and the adopted statutes, affect the adopted statute when the adopting statute set out a complete copy of the adopted statute, including its title and date of approval, and then accepts it. (*Benson v. Olcott*, 249.)

Statutes—Constitutional Provision Demanding That There be but One Subject to be Liberally Construed.

3. While Article IV, Section 20, of the Constitution, demanding that every act embrace but one subject, and the matters properly connected therewith, which subject shall be expressed in the title, is mandatory, and failure to comply with it renders a statute void, yet it should be reasonably and liberally construed to sustain legislation not within the mischief aimed against. (*Lovejoy v. Portland*, 459.)

Statutes—"Subject," in Constitutional Provision Providing That Subject be Expressed in Title, Given Broad Meaning.

4. The term "subject," in Article IV, Section 20, of the Constitution, demanding that every act which embraces but one subject, and matters properly connected therewith, which subject shall be expressed in the title, is to be given a broad and extensive meaning so as to allow the legislature full scope to include in one act all matters having a logical or natural connection, and the subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject and not several. (*Lovejoy v. Portland*, 459.)

Statutes—Provision in General Statutes Relating to Insurance Prohibiting Cities from Imposing License Taxes Properly Connected With Subject of Enactment.

5. The provision within Laws of 1917, page 321, Section 3d, subdivision 6, which prohibits cities and towns from imposing additional license taxes, is properly connected with the subject of such chapter, which generally relates to the regulation and supervision of insurance, and the title is sufficient to include such provision. (*Lovejoy v. Portland*, 459.)

See *Death*, 1-4.

See *Executors and Administrators*, 6, 7.

See *Homestead*, 1-3.

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Requiring Permission to Establish Bank not Denial of Equal Protection.

See *Banks and Banking*, 1.

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Prohibiting a Municipal Corporation from Imposing License Tax on Insurance Agents is No Invasion of Field of Municipal Legislation.

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Plaintiff may Waive Tort and Maintain Assumpsit.

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Order Extending Time for Filing Transcript After Time has Expired is Ineffective.

See Appeal and Error, 28.

Cost of Transcript Properly Divided Between Plaintiff and Defendant.

See Costs, 2.

TRESPASS.

Trespass—Damages not Excessive.

1. In an action for possession of land and damages, defendant having torn down buildings and dredged the land for gold, obtaining about \$20,000 worth of gold, a verdict for \$15,000 *held* not excessive as a matter of law, in view of the evidence and the fact that there was no exception to the instructions on the measure of damages. (*Bessler v. Powder River Gold Dredg. Co.*, 271.)

Trespass—Treble Damages Allowable, Though not Claimed in Complaint.

2. The court can award treble damages under Section 346, L. O. L., as amended by Laws of 1917, page 742, for cutting timber, though treble damages are not claimed in the prayer of the complaint, at least where the award of treble damages is less than the sum prayed for in the complaint. (*Stott v. J. Al. Pattison Lumber Co.*, 604.)

See Trover and Conversion, 2.

Changing Action from Trespass to Contract Properly Allowed.

See Pleading, 3.

TRIAL.

Trial—Requested Instructions as to Right to Recover Payment Improper as Ignoring Other Party's Theory of the Case.

1. In purchaser's action to recover payment on ground of rescission, where vendor denied rescission and claimed a forfeiture for non-payment of installment due subsequent to alleged rescission, requested instruction that purchaser could not recover if defendant retaken property upon default by purchaser *held* improper in ignoring purchaser's theory of the case. (*Cornely v. Campbell*, 345.)

Trial—Findings of Fact to Dispose of All Issues Raised by Pleadings.

2. In trials by the court the findings of fact must be as broad as the issues and must dispose of all questions raised by the pleadings. (*Kee v. Carver*, 406.)

Trial—Finding Should not be Made on Issue Outside Case.

3. In an action to enjoin interference with repair of a ditch in which the only question at issue was repair or enlargement, a finding on the extent of plaintiff's water right in ditch should not have been made. (*Juanto v. Wright*, 420.)

Trial—Offer of Proof was Too General.

4. Offer to prove that plaintiff, with the purpose and intent of cheating, wronging, defrauding and overreaching defendant, loaded each car of cordwood delivered to defendant in a loose, criss-cross manner, etc., followed by reading all of the formal allegations of the answer as to fraud of plaintiff in piling the wood, was properly rejected; the evidentiary facts not being set forth. (*Booth-Kelly Lumber Co. v. Williams*, 476.)

Trial—Exact Language of Requests Need not be Embodied in Instructions Given.

5. In suit involving question whether defendant received the number of cords of wood with which he was charged, where the court described a cord of wood to the jury in accordance with the statutory definition (*Laws 1913, c. 325*), defendant cannot complain that the charge is not in the exact language requested. (*Booth-Kelly Lumber Co. v. Williams*, 476.)

Trial—Refusal of Requested Instruction on Proximate Cause not Reversible Error, Where Same Point was Covered by Other Instruction.

6. In action against county for injuries to automobile driver from defective highway, sustained after driver had turned from highway upon approaching automobile coming from opposite direction, refusal to give defendant's requested instruction as to its non-liability if the proximate cause of the accident was the negligence of driver of other automobile in failing to have automobile lights properly dimmed held not ground for reversal, in view of other instruction given covering substantially same ground. (*West v. Marion County*, 529.)

Trial—Requested Instruction as to Right to Recover Accident Insurance not Covered by One Given.

7. In an action against a fraternal insurer for accident benefits, a requested instruction that if plaintiff directed a barber to remove an ingrowing hair, and he proceeded to remove it under plaintiff's instructions, plaintiff could not recover, though the work was unskillfully done, and the results not such as were anticipated, held not covered by an instruction given, which permitted the jury to find the element of accident in the barber's unskillfulness. (*Kendall v. Travelers' Protective Assn.*, 569.)

Trial—Motion for Nonsuit in Effect a Demurrer to Evidence.

8. A motion for nonsuit is in effect a demurrer to plaintiff's evidence, an objection in purport that it is not sufficient to prove the allegations of the complaint, or to show that the plaintiff was entitled to recover. (*Olds v. Hines*, 580.)

TROVER AND CONVERSION.**Trover and Conversion—Demand and Refusal Essential.**

1. If a person is rightfully in possession of the property of another, and is neither asserting title to it nor exercising such dominion over it as is inconsistent with the right of the owner, then ordinarily a demand must be made for the property, followed by refusal to deliver, in order to work a conversion. (*Daniels v. Foster & Kleiser*, 502.)

Trover and Conversion—Trespass With Assertion of Control Sufficient to Establish Conversion.

2. In trover, it is not enough that the facts show a trespass; yet, if the defendant exercise some act of dominion or control over plaintiff's property in denial of plaintiff's right or inconsistent therewith, defendant is properly charged with a conversion. (*Daniels v. Foster & Kleiser*, 502.)

Trover and Conversion—Allegation of Demand Unnecessary Where There has Been Conversion.

3. Where a conversion has actually occurred, there is no necessity of alleging and proving a demand and refusal to maintain an action of trover. (*Daniels v. Foster & Kleiser*, 502.)

Liable for Agent's Conversion of Goods Used in Its Business.

See Corporations, 6.

TRUSTEE.**Where Trustee Transferred Note There was No Implied Warranty.**

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Foreign Administrator may Sue in Individual Capacity on Foreign Judgment Obtained by Him Against Trustee, in Spite of Statute.

See Executors and Administrators, 5.

Operating Brewery not Forbidden by Ordinance to have Retail Liquor License.

See Intoxicating Liquors, 1.

Transfer of Liquor License by Trustees not Invalid.

See Intoxicating Liquors, 2.

No Cause of Action Against Trustee for Refusal to Deliver Funds Until Demand for Accounting.

See Trusts, 13.

TRUSTS.**Trusts—Trustee Estopped from Denying Creation of Trust.**

1. Trustee, having accepted appointment as such and having received trust fund, will be estopped from questioning the creation of the trust, and from denying the right of beneficiary to the trust fund. (*Boehmer v. Silvestone*, 154.)

Trusts—Termination of Trust by Trustee.

2. If trustee for any reason deemed that the trust should be terminated and the money paid over to the beneficiary, the matter should have been presented by him to the court, and authority therefor obtained from the court. (Boehmer v. Silvestone, 154.)

Trusts—Trustee to Assume Validity of Trust.

3. A trustee must assume the validity of the trust under which he acts until it is actually impeached, though he may have some suspicion that there may have been fraud or collusion in the appointment or settlement. (Boehmer v. Silvestone, 154.)

Trusts—Trustee's Knowledge of Facts That Would Defeat Beneficiary's Title.

4. If a trustee obtains knowledge of facts that would defeat the title of the beneficiary and give it to another, he is not justified in communicating facts to the other person; his duty being to manage property for beneficiary, and not make admissions prejudicial to rights of beneficiary. (Boehmer v. Silvestone, 154.)

Trusts—Duty of Trustee to Use Ordinary Prudence.

5. A trustee must use such care for the safety of the trust fund as a man of ordinary prudence uses in his own business of a similar nature, and is held to a strict accountability for a faithful performance of the duties of his trust. (Boehmer v. Silvestone, 154.)

Trusts—Appropriation of Property by Trustee's Agent.

6. If a trustee employs an agent, and the agent appropriates the property intrusted to him, the trustee will be held responsible. (Boehmer v. Silvestone, 154.)

Trusts—Liability of Trustee for Trust Funds Deposited in Bank.

7. If money is deposited in the bank in such a manner that it is not under trustee's own exclusive control, as where money is deposited, so that it cannot be drawn without the concurrence of another person, it is at the peril of the trustee, and he is liable for any loss occasioned thereby. (Boehmer v. Silvestone, 154.)

Trusts—Investment of Trust Funds.

8. A trustee, who receives trust fund in cash, is required to invest funds in a manner that will be safe and yield a reasonable rate of return to beneficiary, and must follow direction and powers in instrument of trust, if any, as to time, manner, and kind of investment, or in absence of such directions and powers must be governed by general rules of court or statutes, and by sound discretion and good faith. (Boehmer v. Silvestone, 154.)

Trusts—Trust Funds to be Invested in Safe Securities.

9. A trustee with cash funds to invest must not speculate, but make investments with a view to permanent investment, considering both probable income and probable safety of capital, and should invest in government or state securities, or other gilt-edged securities, or in bonds or mortgages on unencumbered real estate. (Boehmer v. Silvestone, 154.)

Trusts—Action for Accounting of Trust Fund may be Against Trustee and Third Person.

10. In suit for accounting of trust fund by beneficiary of trust, third person, to whom trustee lent money pursuant to plan entered into by trustee, beneficiary, and third person, whereby third person was to permit beneficiary to have money before termination of trust, was properly joined with trustee as defendants. (*Boehmer v. Silvestone*, 154.)

Trusts—Reasonableness of Attorney's Fees.

11. Where trustee made loan of \$5,000 trust fund, with the understanding that the borrower was to permit beneficiary to have money before termination of trust, attorney's fee of \$1,000, charged beneficiary by third person, to be paid out of the trust fund, held excessive; but, in view of considerable trouble caused third person by the indorsement of numerous checks by beneficiary, the third person will be allowed fee of \$150 for legal services. (*Boehmer v. Silvestone*, 154.)

Trusts—Compensation of Trustee.

12. Trustee will be compensated for services up to time that nearly all of the fund is expended, but not thereafter. (*Boehmer v. Silvestone*, 154.)

Trusts—No Cause of Action Against Trustee for Refusal to Deliver Funds Until Demand for Accounting.

13. Where defendant had been intrusted with funds by plaintiff's intestate for purpose of investment, and refused to deliver up the money, or deliver up possession of the securities purchased therewith, no cause of action arose against defendant until a demand for an accounting and settlement had been made. (*Reed v. Hollister*, 656.)

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Being Indefinite as to Date of Decree.

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Effect of Failure to Serve and File Undertaking.

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VENDOR AND PURCHASER.**Vendor and Purchaser—Payments Recoverable upon Rescission by Agreement or Rescission by Vendor.**

1. Generally, if land sale contract is rescinded by mutual arrangement and consent, without any agreement for forfeiture, or by wrongful act of the vendor, acquiesced in by the purchaser, purchaser is entitled to recover payments made by him. (Cornely v. Campbell, 345.)

Vendor and Purchaser—No Recovery of Payments by Purchaser upon Forfeiture for His Default.

2. Where vendor does not waive purchaser's default, but declares a forfeiture under contract providing therefor and making time of the essence of the contract, purchaser cannot recover payments already made. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Evidence Sufficient to Warrant Instruction as to Wrongful Repudiation of Contract by Vendor.

3. In purchaser's action to recover payment on ground of mutual rescission, instruction that vendor's wrongful repudiation of contract acquiesced in by purchaser effected a mutual rescission *held* warranted by the evidence. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Purchaser Recovering Payment not Entitled to Interest.

4. Purchaser is not entitled to interest on payment recovered following mutual rescission of contract. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Wrongful Declaration of Forfeiture Entitled Purchaser to Treat Contract as Ended.

5. If vendor under contract giving him the right to declare a forfeiture wrongfully declared a forfeiture where in fact no ground existed therefor, the attempted forfeiture was in effect a refusal to proceed further with the contract entitling purchaser to stand upon his rights under the contract or treat it as ended. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Instruction not Objectionable in Purchaser's Action to Recover Payment Made.

6. In purchaser's action to recover payment on ground of mutual rescission, where vendor denied rescission and claimed forfeiture for default in payment due subsequent to date of alleged rescission, instruction *held* not subject to objection that it submitted question whether there was a default on such subsequent date. (Cornely v. Campbell, 345.)

Vendor and Purchaser—No Forfeiture After Waiver of Default Without Giving Purchaser Opportunity to Perform.

7. Vendor could not declare a forfeiture for default which he had waived without first giving purchaser notice and an opportunity to perform. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Acceptance of Overdue Payment Waiver of Default.

8. Vendor's acceptance of payment after due date amounted to a waiver of purchaser's default in making payment at specified time. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Evidence of Quality of Land Admissible in Purchaser's Action to Recover Payment for Mutual Rescission.

9. In purchaser's action to recover payment on ground of mutual rescission, where complaint alleged the land was of poor quality, so that the value of the use of the land during the time the plaintiff purchaser was in possession was negligible, and, not equaling the value of improvements made and work done on the land by plaintiff, together with plaintiff's expenses, no accounting was necessary to place defendant *in status quo*, and such allegation was denied, evidence as to quality of the land *held* admissible. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Whether Mutual Rescission or Forfeiture for Jury.

10. In purchaser's action to recover payment made on ground of mutual rescission, where vendor denied mutual rescission and claimed a forfeiture, evidence *held* sufficient for submission of case to jury. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Complaint to Recover Payment on Land Contract Held to Allege Mutual Rescission.

11. A complaint to recover payment made on a contract for the purchase of land, which alleged that defendant repudiated the contract, and that plaintiff had elected to accept defendant's repudiation as a mutual rescission, is sufficient, in the absence of a motion to make more definite and certain, to allege rescission by mutual agreement, though the plaintiff's election was not alleged to have been made at the time of defendant's repudiation. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Testimony of Defendant as to Rescission Held Sufficient to Support Finding Against Him.

12. Testimony by defendant vendor that he had declared a land purchase contract forfeited and had burned it up, and that he had notified plaintiff to move off the land, which plaintiff agreed to do as soon as he could rent a place, is sufficient to support a finding of mutual rescission in an action to recover payments made by plaintiff. (Cornely v. Campbell, 345.)

Vendor and Purchaser—Vendor's Words or Conduct Indicating Intention not to be Bound Warrant Rescission by Purchaser.

13. Words or conduct by the vendor, indicating an intention to be no longer bound by the contract, is a sufficient repudiation to warrant the other in rescinding. (Cornely v. Campbell, 345.)

See Adverse Possession, 1-8.

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As to Validity of Assessment by Agreement for Payment by Installments.

See Municipal Corporations, 4.

Error in Substitution of Sheriff's Successor Waived.

See Parties, 1.

Motion to Strike or Make More Definite and Certain Waived by Pleading Over.

See Pleading, 9.

Acceptance of Overdue Payments Waiver of Default.

See Pleading, 4.

See Vendor and Purchaser, 8.

No Forfeiture After Waiver of Default Without Giving Purchaser an Opportunity to Perform.

See Vendor and Purchaser, 7.

WARRANTY.

No Implied Warranty Resulting from Indorsement of Note.

See Bills and Notes, 1.

WATERS AND WATERCOURSES.

Waters and Watercourses—Lower Appropriator cannot Compel Excessive Use by Upper Owner to Get Surplus.

1. A lower appropriator has no right to compel one who has taken out water above him to maintain an excessive use of water so that the former may get the benefit of the surplus, although the upper appropriator has permitted the lower appropriator to construct a ditch on his land to convey surplus waters. (Tyler v. Obiague, 57.)

Waters and Watercourses—Affidavit of Publication of Notice of Issuance of Irrigation District Bonds Sufficient, Though Falling to State Amount of Publication Charge.

2. Though Laws of 1919, page 11, fixing legal charges for the publication of notice and summons, declares that affidavits of proof of publication shall state the amount of the charges, the purpose of the act was merely to prevent overcharge, and an affidavit of notice of publication of an election for the issuance of irrigation bonds is not invalid because it failed to state the amount paid the publisher, the act authorizing the issuance of bonds providing that no irregularity which did not injuriously affect the rights of the parties shall be regarded. (Gard v. Henderson, 520.)

See Constitutional Law, 3.

WIDOW.**Entitled to Exempt Property in Fee.**

See Executors and Administrators, 6, 7.

See Homestead, 1-3.

WILLS.**Wills—Testamentary Capacity not Lost by Guardianship.**

1. One under guardianship of his person and estate does not lose his right to make a testamentary disposition, if he retains sufficient mental capacity to execute a will. (Collins v. Long, 63.)

Wills—Testamentary Capacity of Aged Testator Under Guardianship Shown by Evidence.

2. Evidence held sufficient to show that aged testator, under guardianship of his person and estate, possessed testamentary capacity. (Collins v. Long, 63.)

Wills—Evidence Insufficient to Establish Undue Influence.

3. In a proceeding to set aside a will of an aged testator under guardianship in favor of a daughter, who took care of him, evidence held insufficient to establish undue influence on the part of the daughter and her husband. (Collins v. Long, 63.)

Wills—Reference to Other Will.

4. Where husband's will referred to will of deceased wife, and so described it as to leave no doubt as to its identity, and adopted provision therein with reference to certain trust fund, the provisions of both wills should be considered in relation to the trust fund. (Boehmer v. Silvestone, 154.)

Wills—Construction According to Testator's Intent.

5. Under Section 7347, L. O. L., testator's design governs, if it can reasonably be ascertained. (Boehmer v. Silvestone, 154.)

Wills—Contestant has Burden of Showing Fraud and Undue Influence.

6. Contestants have burden of showing by a preponderance of the evidence their allegations of fraud and undue influence, which induced testatrix to make the will as she did. (Rice v. Rice, 559.)

Wills—Proponents must Prove Testamentary Capacity When Challenged.

7. When a will is challenged on the ground of want of testamentary capacity in testator, it is incumbent upon proponents to prove decedent's capacity to make a will by a preponderance of the evidence. (Rice v. Rice, 559.)

Wills—Evidence of Undue Influence Held Insufficient.

8. Testimony which simply showed that defendants had the opportunity to exercise undue influence upon testatrix was insufficient to authorize overturning of will. (Rice v. Rice, 559.)

WITNESSES.

Credibility of Witnesses is for the Jury.

See Evidence, 7.

WORDS AND PHRASES.

"According to direction thereof"—See *Holland-Wash. Mtg. Co. v. County Court of Hood River Co.*, 668.

"Admitting to bail"—See *Clatsop County v. Wuopio*, 30.

"Adverse party"—See *Jubitz v. Gress*, 332.

"Allowing bail"—See *Clatsop County v. Wuopio*, 30.

"Association"—See *Jubitz v. Gress*, 332.

"Claim of ownership"—See *Bessler v. Powder River Gold Dredg. Co.*, 271.

"Claim of right"—See *Bessler v. Powder River Gold Dredg. Co.*, 271.

"Claim of title"—See *Bessler v. Powder River Gold Dredg. Co.*, 271.

"Debt"—See *Levine v. Levine*, 94.

"Employer"—See *Hornig v. Canby*, 612.

"Evidence"—See *State v. Moss*, 616.

"Plan"—See *Arstill v. Fletcher*, 308.

"Promptly"—See *City of Pendleton v. Jeffery & Bufton*, 447.

"Provided"—See *Griffa v. Monmouth*, 433.

"Satisfactory evidence"—See *State v. Moss*, 616.

"Subject"—See *Lovejoy v. Portland*, 459.

WORK AND LABOR.

See *Landlord and Tenant*, 1.

WORKMEN'S COMPENSATION ACT.

See *Master and Servant*, 2.

WRIT OF REVIEW.

Writ of Review—Where Writ was Quashed for Lack of Jurisdiction, Merits cannot be Considered on Appeal.

1. Where the only ruling made by the court below on a petition for writ of review was to quash and dismiss the writ on the ground of lack of jurisdiction to hear it, the merits of the case cannot be considered on appeal. (*Holland-Washington Mortgage Co. v. County Court of Hood River County*, 668.)

Writ of Review—Court has Discretion to Enlarge Time for Service of Copy of Writ.

2. On petition for a writ of review to be directed to the County Court the circuit judge has authority to extend the time beyond the original return day in which return might be made and service of copy of writ be had upon respondent under Section 609, L. O. L., in view of Section 604, authorizing the Circuit Court or judge thereof to order the writ, Section 608, providing that the writ may be re-

turnable either in term time or in vacation, Section 958, empowering the judge to exercise out of court the powers especially conferred on a judge as contradistinguished from the court, Section 983, giving a court or judicial officer all necessary means to carry into effect jurisdiction conferred, and Section 103, providing that the court may in its discretion allow an act to be done after the time limited by the Code. (Holland-Washington Mortgage Co. v. County Court of Hood River County, 668.)

Writ of Review—Service may be by Delivery of Copy of Writ to Nonresident Personally.

3. It is competent for the legislature to provide that service of a writ of review shall be by delivering to a nonresident personally a copy of the writ. (Holland-Washington Mortgage Co. v. County Court of Hood River County, 668.)

Writ of Review—Order for Writ Need not Prescribe Manner of Service "According to the Direction Thereof."

4. An order for the issuance of a writ of review need not prescribe the manner in which it is to be served nor need the order recite the statute, because serving the writ "according to the direction thereof" as indicated by Section 609, L. O. L., means to serve the writ upon the parties to whom the process is directed. (Holland-Washington Mortgage Co. v. County Court of Hood River County, 668.)

Writ of Review—Petition Need not be Filed Before Order for Issuance.

5. A petition for a writ of review need not be filed before an order for the issuance of the writ is made. (Holland-Washington Mortgage Co. v. County Court of Hood River County, 668.)

Writ of Review may be Served upon County by Delivery to Clerk.

6. A writ of review may be served upon the county by delivering the writ to the county clerk; the service being analogous to that of a summons under Section 55, L. O. L. (Holland-Washington Mortgage Co. v. County Court of Hood River County, 668.)

Writ of Review—County Clerk may Admit Service of Writ of Review for County.

7. A county clerk upon whom a writ of review is served as a process against the county may admit service thereof in his official character which is binding upon the county. (Holland-Washington Mortgage Co. v. County Court of Hood River County, 668.)

Municipal Improvement According to Advertised Plan not Within Scope of Writ.

See Municipal Corporations, 1.

County Court not Proper Party to Writ of Review Directed to County Court.

See Private Roads, 1.

County is Made Defendant by Operation of Law for Writ of Review Relative to Establishment of Private Road.

See Private Roads, 2.

